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IN THE
SUPREME COURT OF THE UNITED STATES

No. A-306

OCTOBER TERM, 1988

OSCAR FERNANDO CUEVAS,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit's ruling, that a person may be convicted of violating 18 U.S.C. §1001 for causing the reportable transport of currency out of the United States in the absence of evidence that a currency report containing any false statements was filed or that any affirmative acts to conceal material information were taken, can stand where that ruling is in conflict with language in Woodward v. United States, 469 U.S. 105 (1985), and with the Eighth Circuit's decision in United States v. Shannon, 836 F.2d 1125 (8th Cir. 1988).

2. Whether the rules excluding hearsay evidence may be circumvented by introducing the "expert opinions" of an investigating agent about the workings of an alleged

conspiracy where the opinion is based on the hearsay statements of a cooperating co-conspirator who is not called as a witness?

3. Whether, as the dissenting judge found, in a case based on allegations that defendant's numerous currency transactions were part of a scheme to launder drug money, the preclusion of testimony by the defendant's expert that the facts proven were consistent with non-narcotics related transactions necessitated by South American currency controls deprived defendant of his due process right to present a defense, especially when the government was permitted to introduce opinion evidence of its "expert" that the facts were consistent with the laundering of drug money?

4. Whether the integrity of the judicial system's subverted where a criminal conviction is upheld on the basis of evidence not introduced by the government at trial?

5. Where an indictment charges the unreported receipt of currency by a financial institution in violation of 31 U.S.C. §5313, whether a conviction may be obtained merely on proof that there were transfers of currency within the financial institution, not initiated by a reportable transaction between the financial institution and a customer?

6. Whether the separate prosecution, conviction and sentence for two conspiracies -- one to aid and abet cocaine traffickers by engaging in currency reporting violations, and the other, to engage in currency reporting violations in order to aid and abet cocaine traffickers -- violates the Constitutional proscription against double jeopardy because the alleged conspiracies were not separate and distinct but rather a single conspiracy phrased in two different ways by a sophistic prosecutor?

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The opinion of the United States Court of Appeals for the Ninth Circuit in United States v. Cuevas, is reported at 847 F.2d 1417 (2d Cir. 1988), and is set forth in the appendix at A-1.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 2, 1988. (A-1) The order denying a petition for rehearing and suggestion for rehearing en banc was entered on August 30, 1988. (A-34) On motion of the Petitioner, Justice Sandra Day O'Connor granted Petitioner's request that the time for filing a petition for writ of certiorari be extended to and including November 28, 1988. (A-36)

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND EVIDENTIARY RULES INVOLVED

U.S. Const., amend. V provides, in pertinent part:

> nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty, or property, without due process of law ...

U. S. Const., amend. VI provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...

18 U.S.C. §371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

21 U.S.C. §841 provides:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --
>
> (1) to manufacture, distribute, or dispense, or process with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a controlled substance.

* * *

21 U.S.C. §846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the subject of the attempt or conspiracy.

18 U.S.C. §1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or

representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

31 U.S.C. §5312(a)(2) provides:

(a) In this subchapter --

(2) "financial institution" means --

(A) an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)));

(B) a commercial bank or trust company;

(C) a private banker;

(D) an agency or branch of a foreign bank in the United States;

(E) an insured institution (as defined in section 401(a) of the National Housing Act (12 U.S.C. 1724(a)));

(F) a thrift institution;

(G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);

(H) a broker or dealer in securities or commodities;

(I) an investment banker or investment company;

(J) a currency exchange;

(K) an issuer, redeemer, or cashier or travelers' checks, checks, money order, or similar instruments;

(L) an operator of a credit card system;

(M) an insurance company;

(N) a dealer in precious metals, stones, or jewels;

(O) a pawnbroker;

(P) a loan or finance company;

(Q) a travel agency;

(R) a licensed sender or money;

(S) a telegraph company;

(T) an agency of the United States government or of a state or local government carrying out a duty or power of a business described in this cause (2), including the United States Postal Service: or

(U) another business or agency carrying out similar, related, or substitute duty or power the Secretary of the Treasury prescribes.

31 U.S.C. §5313 provides:

> (a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instructions the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.
>
> (b) The Secretary may designate a domestic financial institution as an agent of the United States Government to receive a report under this section. However, the Secretary may designate a domestic financial institution that is not insured, chartered, examined, or registered as a domestic financial institution only if the institution consents. The Secretary may suspend or revoke a designation for a violation of this subchapter or a regulation under this subchapter (except a violation of section 5315 of this title or a regulation prescribed under section 5315),

section 411 of the National Housing Act (12 U.S.C. 1730d), or section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b).

(c)(1) A person (except a domestic financial institution designated under subsection (b) of this section) required to file a report under this section shall file the report --

(A) with the institution involved in the transaction if the institution was designated;

(B) in the way the Secretary prescribes when the institution was not designated; or

(C) with the Secretary.

(2) The Secretary shall prescribe --

(A) the filing procedure for a domestic financial institution designated under subsection (b) of this section; and

(B) the way the institution shall submit reports filed with it.

31 U.S.C. §5316(a)(1)(A) provides:

(a) Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly --

(1) transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time --

(A) from a place in the United States to or through a place outside the United States;....

31 U.S.C. §5322(b) provides:

A person willfully violating this subchapter of a regulation prescribed under this subchapter (except section 5315 of this title or a regulation prescribed under section 5315), while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 10 years, or both.

31 C.F.R. §103.11(e) provided, in part:

Currency dealer or exchanger. A person who engages as a business in dealing in or exchanging currency, expect for banks which offer such services as an adjunct to their regular services.

31 C.F.R. §103.22(a) provided, in part:

Each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such

financial institution which involves a transaction in currency of more than $10,000. Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during anyone business day. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit.

* * *

Fed. R. Ev. 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the fact or data need not be admissible in evidence.

Fed. R. Ev. 802 provides:

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

STATEMENT OF THE CASE

This case involves issues of major significance relating to the charging of foreigners whose activities occur outside the United States with violations of American currency reporting requirements. As part of the relatively recent phenomenon of American criminal prosecutions of persons operating outside the United States for their participation in alleged international money laundering operations, Petitioner Oscar Cuevas was charged in a 15 count indictment with participating in an organization that laundered drug proceeds for cocaine dealers dealing in the U.S. The indictment contained two conspiracy counts and 13 substantive counts. Count 1 charged that Cuevas conspired to aid and abet others in the possession and distribution of cocaine by receiving their proceeds and transporting them out of the U.S.

without filing currency reports, in violation of 21 U.S.C. §§846, 841. In Count 2, the government charged that the same conduct also violated 18 U.S.C. §371; merely paraphrasing the allegations in Count 1, the government charged Cuevas with conspiring to violate certain currency reporting statutes in order to aid and abet narcotics traffickers.[1]

The 13 substantive counts charged a grab bag of currency reporting and false statement violations on particular dates. None charged that Cuevas, a businessman who lived in Europe during the period charged in the conspiracies, committed the violations himself. In Counts 3 and 4, he was charged with aiding and abetting

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[1]This conspiracy had three currency reporting violations as its purported objects: (1) to violate 31 U.S.C. §§5313 and 5322(b) by failing to file currency transaction reports for the domestic receipt of currency by the organization; (2) to violate 31 U.S.C. §5316(a)(1)(A) by failing to file currency reports for the export of currency; and (3) to commit the export violations as part of a pattern of illegal currency transactions in violation of 31 U.S.C. §5322(b).

the willful failure to file domestic currency transaction reports (CTRs) for the receipt of currency by his financial institution on two dates. Counts 5, 6, 8, 11, and 13 charged that on five occasions Carlos Guzman acted as a courier and, at Cuevas's direction, failed to file reports for the export of currency (CMIRs). Counts 10 and 15 charged the same offense, but on different dates and with another courier, Charles Spiteri. Counts 7, 9, 12, and 14, which were companion charges to four of the five export charges involving Guzman, alleged that on the same dates, Cuevas aided and abetted Guzman's willful concealment of material facts from the U.S. Customs Service in violation of 18 U.S.C. §1001. Cuevas was extradited from Switzerland to defend the charges.[2]

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[2]Cuevas was arrested in Switzerland on April 11, 1985. His challenge to extradition was unsuccessful. As discussed below in Point IV, in the U.S. Cuevas
(footnote continued)

Based almost entirely on circumstantial evidence, the government attempted to prove that Cuevas coordinated an extensive courier operation for transporting drug proceeds from the U.S. to Europe. Under the government's theory, co-conspirator Ernesto Zawadzki received cash proceeds from drug dealers in the U.S. and, with Cuevas's active involvement, arranged for individual couriers traveling on commercial airline flights to take the proceeds out of the U.S. and deliver them to Cuevas in London; in order to avoid discovery, currency transaction and currency export reports would not be filed.

The government introduced documents evidencing a regular flow of currency from Zawadzki in the U.S., via the couriers, to Cuevas in Europe. The government also showed

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(footnote continued from previous page)
challenged the prosecution as beyond the limits imposed in the extradition decree by the Swiss Court.

that the U.S. Customs Service had no record of currency export reports having been filed by a number of the couriers whose transport of currency was suggested by this documentary evidence.[3]

There was no evidence that Cuevas had any direct connection to cocaine or cocaine dealers. Rather, the government presented three pieces of circumstantial evidence to show the so-called "cocaine connection." First, a confessed drug dealer testified that on two occasions, in 1983 or 1984, he delivered proceeds from the sale of cocaine to

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[3]The government produced direct evidence of only six carries. And, with respect to only two of these -- those by courier Charles Spiteri -- was there evidence to support the substantive charges that a currency export report was not filed. Though the government based 9 substantive counts on unreported carries by Carlos Guzman, there was no evidence that customs records were searched in Guzman's name and, therefore, it was impossible to tell whether or not he had filed report. Customs records also showed that, on a number of occasions including at least one carry by Guzman, a currency report was filed, but filed late.

Zawadzki on behalf of another.[4] Next, there were traces of cocaine on quantities of cash found in Carlos Guzman's suitcase and in Zawadzki's apartment after their arrest. Third, the activation of a beeper, seized from Zawadzki after his arrest, led an undercover DEA agent to a meeting which resulted in the delivery of $100,000 to the agent and the seizure of cocaine.

Finally, there was evidence that Cuevas engaged in certain conduct that either facilitated the money laundering operation, or was designed to keep his connection to the

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[4]These transfers of currency to Zawadzki were the only receipts of currency by the alleged financial institution the government proved. However, the failure to file a domestic currency transaction report on these occasions was not charged. Rather, the government charged that Cuevas aided and abetted the willful failure to file domestic currency transaction reports on the two dates that courier Charles Spiteri exported currency without filing the required export report. No evidence that the Cuevas/ Zawadzki financial institution received a reportable amount of currency on these dates was offered.

enterprise from being discovered. Significantly, the investigating DEA agent, who was proffered by the government as an "expert" on narcotics and money laundering, testified that this evidence was consistent with laundering of money from any source and did not itself suggest that the money was narcotics proceeds. Also significant is that the government showed that Cuevas filed CMIRs for the importation into the U.S. of millions of dollars in currency -- a practice wholly at odds with knowingly laundering narcotics proceeds derived in the U.S.

The government was nevertheless able to pull together many of the loose strands of its case and to confirm its theories about the workings of the money laundering operation and its connection to narcotics through the artifice of the investigating DEA agent's "expert opinions." However, the agent had

interviewed Zawadzki and candidly admitted that his "opinions" were based on what Zawadzki had told him. Zawadzki was not a witness at trial.

The thrust of the defense case was that Cuevas did not know, and had no reason to know, that any funds he received in Europe were narcotics proceeds. It was his position that, in fact, $19 million received by him in London constituted U.S. dollars sold to his family's Panamanian company by a Colombian who turned to the black market to exchange currency. The trial court, however, precluded as irrelevant testimony from a defense expert on South American monetary policy who would have explained why rigid currency controls in Colombia often led to such arrangements.

Cuevas was convicted on each count and sentenced to a total of 15 years incarceration: ten years for the conspiracy

charged in Count 1, consecutive with five years on the conspiracy charged in Count 2 and six of the substantive counts. On the remaining counts, Cuevas received probation and a five year suspended prison term.

The Court of Appeals for the Ninth Circuit, by a vote of 2 to 1, affirmed. The majority rejected Cuevas's claim that there was insufficient evidence of the conspiracy charged in Count 1, and the substantive counts involving unreported exports by Carlos Guzman. In both cases the Court affirmed on the basis of evidence relied upon by the government on appeal, but never presented at trial: that a search for CMIRs in Guzman's name had been conducted, and that Cuevas continued to engage in money laundering activities after learning that Zawadzki was arrested on narcotics charges.

Similarly, the Court also rejected Cuevas' challenge to the prosecution for currency reporting violations under the doctrine of specialty on the basis of evidence outside the record: that, in enjoining prosecution or punishment in the U.S. for the "fiscal aspect of the factual circumstances of the indictment," the Swiss Court meant only to enjoin prosecution for "tax offenses."

The Court also rejected Cuevas's sufficiency challenge to Counts 3 and 4 which charged the unreported domestic receipt of currency by the Cuevas/Zawadzki financial institution. The Court held that domestic transfers within a financial institution, whether or not triggered by a transaction between the institution and a customer, must be reported and that proof of such a transfer would satisfy the charge of unreported receipt.

The Court found no merit to Cuevas's contentions that violations of 18 U.S.C. §1001 were not proved, and that conviction and consecutive sentencing on the conspiracies charged in Counts 1 and 2 violated double jeopardy. The Court held that Guzman's "recurrent failure to file" currency reports and false statements to customs officials on a date subsequent to the dates charged in Counts 7, 9, 12, and 14 supported the inference that he was "participating in a deceptive 'scheme'" to conceal material facts on the dates charged. The Court reasoned that double jeopardy was not violated because each conspiracy required proof of a fact which the other did not: Count 1 required intent to possess and distribute cocaine, and Count 2 required proof of particular unreported currency transactions.

The majority also rejected a challenge to the "expert opinion" testimony of the investigating DEA agent, and the preclusion of testimony by the defense expert regarding South American currency controls. Relying on Fed. R. Evid. 703, the Court approved the DEA agent's reliance on the hearsay of Zawadzki in formulating his opinions. With regard to the defendant's expert, the Court opined that the proffered testimony was properly precluded as irrelevant.

Judge Ferguson dissented. Recognizing that currency exchange is not illegal per se and that, therefore, the impetus for the proven currency transactions lay at the heart of the conspiracy charges, Judge Ferguson reasoned that the proffered expert's testimony was relevant because it "could have provided a legitimate and non-criminal explanation for Cuevas's currency exchange activities."

Noting that the government was permitted to offer an explanation for the transactions from its expert, Judge Ferguson found that the refusal of the court to hear a different explanation from defendant's expert deprived Cuevas of his fundamental right to present his defense.

REASONS FOR GRANTING THE WRIT

POINT I

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE CONVICTIONS FOR VIOLATING 18 U.S.C. §1001 WHERE THERE WAS NO EVIDENCE OF EITHER A FALSE STATEMENT OR AFFIRMATIVE ACT OF CONCEALMENT IS CONTRARY TO THIS COURT'S HOLDING IN UNITED STATES V. WOODWARD, AND CONFLICTS WITH THE HOLDING OF THE EIGHTH CIRCUIT IN UNITED STATES V. SHANNON

In United States v. Woodward, 469 U.S. 105 (1985), this Court considered the relationship between currency reporting violations and 18 U.S.C. §1001.[5] The Court held that a person who failed to report that he was importing over $5000 in currency and falsely stated on a Customs form that he was not carrying such an amount could be convicted of and receive consecutive punishments for the currency reporting violation and 18 U.S.C.

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[5] Woodward involved a violation of 31 U.S.C. §§1058, 1101 (1976 ed.). These statutes have been revised and are now found at 31 U.S.C. §§5313, et. seq.

§1001 without offending the prohibition on double jeopardy. In so holding, the Court reasoned that proof of a willful failure to file a required report does not necessarily include proof of a false statement offense, and offered the following hypothetical:

> A traveler who enters the country and passes through Customs prepared to answer questions truthfully, but is never asked whether he is carrying over $5000 in currency, might nonetheless be subject to conviction under 31 U.S.C. §1058 (1976 ed.) for willfully transporting money without filing the required currency report. However, because he did not conceal a material fact by means of a "trick, scheme or device," (and did not make any false statement) his conduct would not fall within 18 U.S.C. §1001.

469 U.S. at 108. In a footnote at the end of this quoted portion, the Court noted with approval the Fifth Circuit's opinion in United States v. London, 550 F.2d 206, 213 (5th Cir. 1977), in which that Court recognized that concealment under 18 U.S.C. §1001 involves

more than mere non-disclosure of material facts; it requires proof of an "affirmative act by which means a material fact is concealed."

Consistent with these holdings, the Eighth Circuit held in United States v. Shannon, 836 F.2d 1125, 1129-1130 (8th Cir. 1988), that a defendant's passive failure to reveal a material fact without taking any affirmative steps to conceal the fact was insufficient to support a conviction for a concealment violation under §1001, even if it was part of larger "scheme" to conceal funds from the IRS by the circumvention of currency transaction reporting requirements.

The Ninth Circuit ignored the affirmative act requirement recognized by this Court and the Fifth and Eighth Circuit Courts of Appeal. It held that no affirmative act of concealment was necessary. Rather, according to the Ninth

Circuit, "Guzman's recurrent failure to file CMIRs for currency deliveries to Britain" and evasive behavior when he was subsequently arrested supported the inference that he had earlier concealed material information while "participating in a deceptive 'scheme.'"

The Ninth Circuit's holding is not only contrary to the evidence,[6] but represents a radical departure from Woodward, London, and Shannon. As stated in these cases, a concealment offense under §1001 requires the commission of affirmative acts by which means material facts are actively concealed, not the mere failure to disclose the material facts, and not the making of an affirmative act of deception weeks later; an affirmative act of concealment means more than the mere failure

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[6]As noted in note 3, above, and discussed in Point IV, below, the government did not adduce evidence that customs records were searched in Guzman's name and, therefore, the Court was wrong in saying that Guzman recurrently failed to file reports.

to file while participating in a conspiratorial "scheme" to circumvent currency reporting requirements.

Guzman's false statements about what he was carrying when he was arrested on November 30 does not constitute a trick, scheme or device by which material facts were concealed weeks earlier on November 9, 12, 19, and 22. His failure to file reports, even if it had been proven, is, "the mere omission of failing truthfully to disclose a material fact, ... [and] does not make out an offense under the conceal or cover up clause of §1001." United States v. London, 550 F.2d at 214.

The Ninth Circuit's contrary holding encourages the kind of over-zealous over-charging that occurred in this case, and runs counter to legislative intent. Every failure to file will be convertible into two offenses with the potential for consecutive sentences

merely on evidence that the failure to file was "planned" or "schemed." To resolve the conflict in the circuits and to insure that the law in the Ninth Circuit is consistent with this Court's holding in Woodward, the writ of certiorari should be granted.

POINT II

A DEFENDANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM IS VIOLATED WHEN THE INVESTIGATING AGENT, THROUGH THE ARTIFICE OF "EXPERT OPINIONS," SERVES AS A CONDUIT FOR THE HEARSAY OF AN ABSENT CO-CONSPIRATOR

This case presents the question of whether the "expert opinions" of an investigating agent about the workings of a charged conspiracy may be based on information supplied by a cooperating co-conspirator who is not called to testify by the government. The Ninth Circuit approved such a ploy for the transformation of inadmissible hearsay into admissible evidence.

At trial, the investigating agent candidly and repeatedly admitted that his multitudinous "opinions" about the workings of the money courier operation were based on conversations he had had during debriefings of Ernesto Zawadzki. The Ninth Circuit held that

Fed. R. Ev. 703 authorized such reliance by the investigating agent on hearsay from an alleged co-conspirator in formulating his "expert opinions." Rule 703 cannot, and certainly should not, be read so broadly.

Under the rule, only if the facts upon which an expert bases his opinion are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject" may the facts be inadmissible hearsay. An investigating agent may certainly obtain "knowledge" about the workings of an operation based on information supplied by a participant, and may form an "opinion" about the credibility of the informant, but it cannot be said that he reasonably relied on this source to form any independent "opinions" about the evidence. Stated simply, in a criminal prosecution, an "expert" should not be permitted to base his

"opinions" on information he has received about the defendant's activities beyond the evidence introduced at trial. If he is permitted to do so, the defendant is necessarily deprived of his Sixth Amendment right to confront and cross-examine the informant. Cf. United States v. Check, 582 F.2d 668, 679 (2d Cir. 1978); United States v. Figueroa, 757 F.2d 466 (2d Cir. 1984), cert. denied, 106 S.Ct. 122 (1985) (Second Circuit cases which reject use of agent's testimony as conduit for informant hearsay).

Through the artifice of the agent's "expertise," the government not only transmitted Zawadzki's hearsay, but also conveyed to the jury that Zawadzki had confirmed the entire theory of their case. Given the agent's assurances that his "opinions" about the workings of the conspiracy were based on what he had been told

by Zawadzki, the jury was undoubtedly led to believe that the agent's ultimate "opinion" -- i.e., that the facts proven reflected a narcotics money laundering operation -- was also confirmed by Zawadzki. In fact, however, this was far from the truth. As Judge Ferguson noted in his dissent:

> in his own prosecution, Zawadzki consistently maintained that he did not know that some of the money he transported came from drug sales. Thus the government was unable to show that Zawadzki had ever stated or even implied that Cuevas had knowledge that any of the currency he exchanged had illicit origins. Moreover, none of the witnesses presented at trial testified that they had ever discussed with Cuevas or overheard him speak of the money having illicit origins.

The Second Circuit has recognized the impropriety of what was permitted in this case. In United States v. Young, 745 F.2d 766 (2d Cir. 1984), cert. denied, 105 S.Ct. 1842 (1985), Judge Newman wrote in his concurrence:

> The "aura of special reliability and trustworthiness" surrounding expert testimony, which ought to caution its use ... poses a special risk in [narcotics cases]. That risk arises because the jury may infer that the agent's opinion about the criminal nature of the defendant's activity is based on knowledge of the defendant beyond the evidence at trial. That risk is increased when the opinion is given by the "very officers who were in charge of the investigation." (Citations omitted.)

Here, the agent stated expressly that his "opinions" were based on knowledge of the defendant's activities beyond the evidence at trial.

The Ninth Circuit's holding gives prosecutors a license to present the testimony of informants -- who obviously have tremendous incentive to curry favor with false information -- while insulating the informant from the rigors of cross-examination. As cases get more complex, and proven conduct more ambiguous, the government will undoubtedly turn more and more often to its

"investigator/experts" to explain, and confirm, the government's theory of the case. Such reliance on untested informant hearsay not only violates the defendant's constitutional right to cross-examination, but gravely threatens the reliability of the fact-finding process.

The Petition for Certiorari should be granted to rectify this misreading of the rules of evidence and the infringement on defendant's Sixth Amendment rights.

POINT III

THE PRECLUSION OF DEFENSE EXPERT TESTIMONY THAT THE PROVEN FACTS ARE CONSISTENT WITH AN INNOCENT EXPLANATION IS A DEPRIVATION OF DUE PROCESS; THE DISCRETION OF THE TRIAL COURT TO ADMIT EXPERT TESTIMONY MUST NOT BE EXERCISED IN A WAY THAT DEPRIVES DEFENDANT OF THE OPPORTUNITY TO PRESENT A DEFENSE.

As Judge Ferguson observed in dissent, the central issues in this case were whether the currency involved was in fact narcotics proceeds and whether Cuevas had knowledge of this fact. The government's evidence showed only a flow of currency from Zawadzki in the U.S., via couriers, to Cuevas in Europe that was, on occasion, unreported by some of the couriers, that some of this currency was narcotics proceeds, and that Cuevas engaged in conduct that either facilitated the apparent money laundering operation, or was designed to keep his connection to the enterprise from being discovered.

However, the government had no evidence that defendant knew that any currency derived from narcotics, and was faced not only with the admission of its own expert that defendant's inculpatory conduct was consistent with a range of non-narcotics related activities, but also evidence of the reporting of millions of dollars of currency transactions by defendant -- a practice wholly at odds with laundering drug money.

The government was nevertheless able to confirm its theory about the connection of the money laundering operation to narcotics through the expert opinion of the investigating DEA agent. After repeatedly informing the jury that his opinions were based in part on his debriefings with the absent Zawadzki (see Point II), he was permitted to opine that all of the loose

strands of the government's case were consistent with the laundering of narcotics proceeds.

Defendant proffered an expert on South American currency controls who could have given the jury an alternative explanation: that the facts proven were consistent with the kinds of black market international currency transactions to which South American currency controls give rise.

The Ninth Circuit majority approved the exclusion of the defendant's expert testimony as simply a matter within the discretion of the trial judge, concluding that the judge's twin determination that the proffered testimony was irrelevant -- because the expert "could not have explained the necessity for transporting United States dollars to Europe" -- and "potentially confusing" was not "manifestly erroneous."

The question, however, is not merely one of reviewing a discretionary evidentiary ruling. It is, as Judge Ferguson realized in dissent, whether, by excluding the defendant's expert testimony while allowing the government's, the district court deprived Cuevas of his fundamental rights to present a defense and to a fair trial.

The proffered expert testimony was not only relevant, but it was absolutely essential to the defense.[7] Because this was so, the trial court was not entitled to the deference

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[7]As Judge Ferguson points out in his highly critical dissent, the irrelevance determination was, in fact, "totally erroneous." The testimony was relevant because it could have provided a legitimate and non-criminal explanation for the currency exchange activities proven at trial; the expert offered to testify about the access of South American businesses to U.S. currency within countries such as Colombia where currency controls exist, why those controls necessitate obtaining cash from companies and locations outside of those countries, the manner in which U.S. currency can be obtained for those companies, as well as general business policies in Europe as they relate to South American countries and businesses.

normally accorded by appellate courts in reviewing evidentiary decisions. The exclusion of the evidence worked a violation of a fundamental constitutional right. Washington v. Texas, 388 U.S. 14 (1967); Pennsylvania v. Ritchie, 107 S.Ct. 989, 1001 (1987); Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984).

To guide trial courts faced with evidentiary issues, and appellate courts in their review of evidentiary rulings, which involve the presentation of a defense, this petition for certiorari should be granted.

POINT IV

THE INTEGRITY OF THE JUDICIAL PROCESS IS SUBVERTED WHEN A CRIMINAL CONVICTION IS UPHELD ON THE BASIS OF EVIDENCE OUTSIDE THE RECORD

On three separate, crucial points the Ninth Circuit went outside the record to find evidence that supported this prosecution and these convictions. Not only is the defendant's right to confront and cross-examine witnesses against him violated by such a process, but the integrity of the judicial system is subverted.

Critical to the conviction on the nine substantive counts involving unreported exports of currency by Carlos Guzman was evidence that a search had been conducted in his name, and no CMIR's were found. The Court of Appeals asserts that a "thorough search" was conducted under Guzman's name which produced only one currency report which was filed late. The assertion is absolutely

contrary to the record, and shows, at best, a Court misled by the prosecutor, or, at worst, a cynical cover-up of government incompetence.[8]

Similarly, in upholding the conviction on Count 1, the Court relies on purported evidence that Cuevas continued to engage in currency transactions even after learning that Zawadzki was arrested on narcotics charges. There was no evidence that Cuevas knew of the nature of the charges against Zawadzki.

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[8]As repeatedly argued to the Court below, the government introduced a memorandum which listed the names that it requested Customs to search. While the memorandum was entitled, "Guzman, Carlos E., Et al," Guzman's name is not one of the 21 names listed in the body of the memorandum for which a search was requested. The customs employee who actually conducted the search listed at trial the names she was given and for which she searched. Consistent with the memorandum, her list also did not include Guzman's name. A summary chart, which was wholly dependent on the records uncovered as a result of the search described by the customs employee, included a currency report filed by Guzman. However, this report also contained the name of a business entity that was among those names actually searched, and, therefore, provided no evidence of a search under Guzman's name.

The same reaching outside the record supported the Court's rejection of defendant's challenge to the prosecution under the doctrine of specialty. Application of the doctrine depended on the construction of an ambiguously worded -- or translated -- injunction in the Swiss extradition decree against punishment for the "fiscal aspect of the factual circumstances of the indictment." The Ninth Circuit first erroneously concluded that the term "fiscal" was nowhere defined in the Swiss decree, and then, seeking to define the term, asserted out of whole cloth that the Swiss had originally initiated a tax prosecution against Cuevas. It then concluded that the prohibition against punishment for "fiscal aspects" in the decree referred only to prosecutions relating to "taxes." <u>There was no Swiss prosecution relating to taxes</u>, and the term "fiscal" acts was specifically

defined in the Swiss decree as the "export of foreign currency without a permit, without a declaration."

The defendant vigorously challenged the appellate court's misstatement of the record and reliance on evidence asserted by the government but not offered by it at trial. These challenges were summarily dismissed. The petition for certiorari should be granted as a vital check against appellate court over-reaching and to restore the integrity of the judicial system.

POINT V

A CHARGE THAT A FINANCIAL INSTITUTION FAILED TO REPORT A DOMESTIC RECEIPT OF CURRENCY CANNOT BE SUSTAINED ON PROOF OF A TRANSFER OF CURRENCY WITHIN THE FINANCIAL INSTITUTION

Counts 3 and 4 charged that Cuevas willfully failed to file a currency transaction report for the "receipt" by his financial institution of $400,000 on November 18, 1984, and $494,000 on November 24. The only evidence of a domestic transfer of currency on these dates involved the delivery of money by Zawadzki to courier Charles Spiteri for export to defendant in Europe.

The Ninth Circuit held that a conviction could be sustained on these counts merely on proof of a transfer of currency either "through" the Cuevas financial institution, or between "agencies, offices, or branches" of

it; there was no need to prove a transaction between outside "customers" and the "financial institution."

This reading ignores the actual charges in the indictment of unreported "receipt" by the financial institution, and conflicts with the Ninth Circuit's prior opinion in United States v. Mouzin, 785 F.2d 682 (9th Cir. 1986). Moreover, the Court's reading of the regulations as mandating the reporting of every internal transfer of currency within a financial institution in excess of $10,000 is inconsistent with the statutory scheme which envisions a transaction between the financial institution and a customer as the triggering event for the filing of a currency report by the financial institution. The holding creates an administrative nightmare far in excess of that contemplated by the statutory/ regulatory scheme. It would, for example,

require the filing of millions of additional reports by personal of any large bank who daily engage in thousands of internal treasury operations involving sums in excess of $10,000. For these reasons, the certiorari petition should be granted.

POINT VI

CONSECUTIVE SENTENCES FOR TWO CONSPIRACIES -- ONE TO AID AND ABET NARCOTICS TRAFFICKERS BY TRANSPORTING THEIR PROCEEDS WITHOUT FILING CURRENCY REPORTS, AND ONE TO VIOLATE CURRENCY REPORTING STATUTES IN ORDER TO AID AND ABET NARCOTICS TRAFFICKERS -- VIOLATES DOUBLE JEOPARDY

Multiple punishment for separately charged offenses violates double jeopardy if the evidence required to support a conviction on one is sufficient to warrant a conviction on the other. Here, since the agreement not to report currency exports was identified in Count 1 as the means for aiding and abetting the possession and distribution of cocaine, sufficient proof of the Count 1 conspiracy necessarily required proof sufficient to warrant a conviction on Count 2.

The Ninth Circuit's contrary holding rested on the erroneous assumption that, in order to sustain a conviction on Count 2, the

government needed to prove substantive violations of each reporting statute identified in the multi-object conspiracy. It is elementary that, in order to sustain a conspiracy conviction, the object of a conspiracy need not be realized, and only one object of a multiple-objective conspiracy need be proven. See e.g., United States v. Cunningham, 723 F.2d 217 (2d Cir. 1983).

The Ninth Circuit's opinion encourages over-zealous prosecutors to double the penalty for a single conspiracy merely by clever rephrasing: the ends of one conspiracy count become the means in another conspiracy count, and the means of the first simply become the ends in the second. The petition for certiorari should be granted to prevent such sophistry and to insure compliance with the constitutional proscription against Double Jeopardy.

CONCLUSION

For the above stated reasons, the writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 21, 1988
New York, New York

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. OSCAR FERNANDO CUEVAS, *Defendant-Appellant.*	No. 87-5007 D.C. No. CR-85-0919-R OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, Chief Judge, Presiding

Argued and Submitted
February 5, 1988—Pasadena, California

Filed June 2, 1988

Before: Arthur L. Alarcon, Warren J. Ferguson and
Robert R. Beezer, Circuit Judges.

Opinion by Judge Beezer; Dissent by Judge Ferguson

SUMMARY

Criminal Law/Criminal Procedure/International Law

Appeal from conviction of various drug related charges. The court affirmed holding that a slight connection existed to convict defendant of knowing participation in the movement of drug money and his prosecution was not a violation of the doctrine of speciality.

Appellant Cuevas, alias Gomez, received from the U.S. sizable amounts of narcotics revenues at a Switzerland address. No Currency Monetary Instrument Report (CMIR) had been filed. Ernesto Zawadski coordinated the collection of sizable narcotics revenues in the U.S., recording the transactions in a ledger, and disseminating the narcotics revenues to cash couriers Guzman, Onate, and Lozano, for transport to Cuevas. Zawadski's ledger indicated that he had dispatched cash couriers to London regularly for contact with Cuevas, who then "laundered" the American bills at London banks. Courier Spiteri testified that he delivered without CMIR's $400,000 in cash to Cuevas. Zawadski and Guzman were then arrested. The cash they carried was tainted with the scent of cocaine. No CMIR had been filed. Cuevas denied knowing Zawadski or Guzman or of the criminal charges pending against them. Cuevas was then arrested in Zurich. An extradition order issued for him identifying the alleged narcotics violations and currency transactions relating thereto as the basis for the extradition. The order also contained an "injunction," advising U.S. authorities not to prosecute Cuevas for "the fiscal aspect of the factual circumstances of the indictment." "Fiscal aspect" was not defined in the order. Cuevas was convicted.

[1] Knowingly facilitating the movement of money derived from narcotics out of the U.S. for narcotics traffickers can support a charge and conviction of a conspiracy to aid and abet narcotics trafficking. [2] Once the government proves that a narcotics conspiracy exists, "evidence of only a *slight connection* is necessary to convict a defendant of knowing participation in it." [3] Here, sufficient evidence supports a rational inference that appellant knew quantities of cash he deposited were derived from the narcotics conspiracy coordinated by Zawadski. [4] All the evidence suggests that Cuevas was intimately familiar with the nature of Zawadski's activities and was, therefore, a knowing participant in the narcotics conspiracy. [5] Currency transaction reports [6] must be filed when currency transfers exceed $10,000 in one day or

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$100,000 in a twelve month period. [7] The government must produce evidence of physical transaction in currency. [8] Overwhelming evidence supports the finding that individual, international transfers to Cuevas regularly exceeded $10,000. [9] Further, even if the transfers were between separate branches or offices of the Cuevas-Zawadski operation, they were transfers between legally distinct financial institutions, and were thus subject to the reporting requirements of 31 C.F.R. 103.11(e)(3). If they were merely within the Cuevas organization, they qualified as transfers through the financial institution, and were thus subject to the reporting requirements of 31 C.F.R. 103.22(a)(1). [10] The doctrine of speciality prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite. [11] The order states that Cuevas is to be extradited on the fifteen-count indictment, including currency violations. However, appended to the order is an injunction prohibiting prosecution or punishment concerning the fiscal aspect of the indictment. [12] The Swiss do not oppose prosecution to the full extent of the fifteen count indictment. The money hauls or currency transactions derived from narcotics should not remain without consideration. Prosecution for the hauls themselves should not lead to the payment of taxes or fees or any fiscal penalties; nor should taxes, fees, or fiscal penalties relating to the money hauls be imposed surreptitiously through narcotics conspiracy penalties. [13] Since the appropriate test is whether the extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited, and since the Swiss court consistently characterizes the narcotics and currency reporting conspiracies as integrally related, the doctrine of speciality is not violated. [14] Despite a substantial overlap in the proof offered to establish the crimes, two offenses are not the same offense for double jeopardy purposes if each provision requires proof of an additional fact which the other

does not. [15] Neither count 1 nor 2 is a lesser included offense of the other.

The dissent disagrees with the majority's conclusion that the district court did not abuse its discretion by refusing to allow Cuevas' expert witness to testify.

COUNSEL

Victoria B. Eiger and Nathan Z. Dershowitz, Dershowitz & Eiger, New York, New York and Alan M. Dershowitz, Cambridge, Massachusetts, for the defendant-appellant.

Jeffrey C. Eglash and Gordon Greenberg, Assistant United States Attorneys, Los Angeles, California, for the plaintiff-appellee.

OPINION

BEEZER, Circuit Judge:

Oscar Cuevas was convicted of conspiracies to possess and distribute cocaine and to violate federal currency reporting laws. He was also convicted of 13 substantive offenses. He argues that the convictions should be reversed for insufficient evidence, nonconformity of his indictment to a Swiss extradition order and multiple trial errors. He argues that his cumulative sentences violate double jeopardy. We affirm.

FACTS

This case involves sizable currency transactions[1] between the United States and foreign countries from 1983 to 1985.

[1]Concededly exceeding 19 million dollars.

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The alleged purpose of the currency transactions was "laundering"[2] of profits from a United States-based narcotics conspiracy.

In October 1983, under the assumed name of "Hector Gomez," Cuevas began receiving Brinks bags labeled "promissory notes" at an address in Zurich, Switzerland. The bags were shipped by Alvaro Lozano ("Lozano") from Miami, Florida. Seven shipments of putative "promissory notes" passed from Lozano to Gomez between November 2, 1983 and December 9, 1983. The shipments halted on December 9, 1983, when a Customs official discovered $240,000 cash in a bag labeled "promissory notes." Since Brinks did not suspect cash transport, a Currency Monetary Instrument Report ("CMIR") had not been filed. Brinks attempted to locate Cuevas at his Miami and Zurich addresses; both addresses were abandoned.[3].

In December 1983, Cuevas rented offices in Mexico City. On April 8, 1984, a courier in Cuevas' service was detained entering England; he carried a suitcase containing $177,000 cash. The courier, Rafael Onate-Serrano ("Onate") had failed to file a CMIR before transporting this cash, as required by 31 U.S.C. § 5316.

In May 1984, Onate ("Onate") and Ernesto Zawadski ("Zawadski") rented neighboring apartments in California. Zawadski then rented a second apartment in Miami. Cuevas listed the Miami apartment as his own address. Shortly after

[2]Hereinafter "money laundering" refers to a process by which cash derived from a criminal enterprise "may be easily exchanged without a trace of [its] origin." *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986). *See also* President's Commission on Organized Crime, *The Cash Connection: Institutions and Money Laundering*, at 7 (Interim Report, Oct. 1984) (" 'money laundering' is the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate.")

[3]No forwarding addresses had been supplied.

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renting the Miami apartment, Zawadski and Cuevas flew to meet Carlos Guzman ("Guzman") in Los Angeles. Guzman became a cash courier for Zawadski and Cuevas.

Cuevas returned to London (alias "Gomez"). Zawadski began coordinating collection of sizable narcotics revenues in the United States, recording the transactions in a ledger, and disseminating the narcotics revenues to Guzman, Onate, and Lozano,[4] for transport to Cuevas. Telephone records indicate that Zawadski communicated regularly with Cuevas in London, often before trips by Guzman and Onate. Cuevas purchased airline tickets and hotel reservations for Guzman and Onate, as well as for confessed courier Charles Spiteri ("Spiteri").

Between June and November 1984, Cuevas deposited at least $19 million in small denomination U.S. currency at Citibank, London. In November 1984, believing that Cuevas' deposits were illegally obtained, Citibank terminated the relationship with him. Thereafter, Cuevas deposited $4.4 million in cash at Republic National Bank, London.

Back in the United States, Zawadski collected millions of dollars in narcotics proceeds, including at least $900,000 from Ralph Mastrangelo ("Mastrangelo"). Zawadski filled a ledger with details of these narcotics transactions. The ledger indicated that Zawadski had dispatched cash couriers to London regularly for contact with Cuevas, who then "laundered" the American bills at London banks. Cuevas' London deposits were recorded in Zawadski's ledger.

Cuevas, alias "Gomez," met couriers on their arrival in London, paid them, arranged travel plans, and entertained.

[4]Evidence was introduced that Zawadski utilized a "beeper system" (communication system) to allow cocaine traffickers to contact him more readily. Cash couriers were instructed on how to use the communication system by Cuevas.

When couriers were intercepted,[5] they gave false and conflicting stories as to the source of cash carried.

On one occasion, courier Spiteri was given Zawadski's "beeper number" by Cuevas. Cuevas told Spiteri how to contact Zawadski when Spiteri returned to the United States.

Spiteri testified that he delivered (without CMIR's) $400,000 in cash to Cuevas on November 18, 1984 and $494,000 in cash to Cuevas on November 24, 1984. These deliveries are corroborated by Zawadski's ledger.

On November 30, 1984, Zawadski and Guzman were arrested in Los Angeles, carrying a suitcase which contained $516,000 in small denomination United States currency. The cash was tainted with the scent of cocaine. A CMIR had not been filed for the cash.

Pursuant to a legal search warrant, an additional $1,083,000 in cocaine-tainted cash[6] was then seized from Guzman's apartment.

Cuevas immediately flew to Los Angeles from London. He met Spiteri. During the rendezvous, Cuevas explained to Spiteri that Zawadski was being pursued. Cuevas told Spiteri "the Palestinians [were] after Zawadski" because Zawadski had a document valued at "a million dollars" to "the Israelis." Spiteri was instructed that "Gomez" (Cuevas) would be recognized by "the Palestinians." On Cuevas' instruction, Spiteri proceeded to confirm Zawadski's arrest. On discovering that Zawadski had been arrested, Cuevas returned to London. Cuevas continued to receive cash from couriers, aware that Zawadski was being held on narcotics charges.

[5]Couriers often arrived carrying unfiled, and therefore invalid, CMIRS in the name of a company ("Delta Palme") which had no legal existence; the company had been established by Lozano, with Cuevas' assistance.

[6]The cash was packed in envelopes resembling those in which cash previously carried by Spiteri to Cuevas had been packed.

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On March 23, 1985, Cuevas stated, in a sworn affidavit, that he had "never heard of" Zawadski or Guzman, and that he knew nothing of criminal charges pending against them.

On April 11, 1985, Cuevas was arrested in Zurich. Seized at the time were "beeper" numbers of active narcotics traffickers and cash couriers, a fraudulent passport (in the name of "Hector Gomez," bearing Cuevas' photograph), and CMIR's signed "Gomez."

On July 21, 1986, an extradition order issued for Cuevas. The order identified the alleged narcotics violations and currency transactions relating thereto as the basis for the extradition. The order also contained an "injunction," advising United States authorities not to prosecute Cuevas for "the fiscal aspect of the factual circumstances of the indictment." "Fiscal aspect" was not defined in the order.

On December 19, 1986, Cuevas was convicted of conspiring to aid and abet the possession and distribution of cocaine, in violation of 21 U.S.C. §§ 841, 846; of willfully failing to report currency transactions in excess of $10,000, in violation of 18 U.S.C. § 371; of failing to report the export of currency in excess of $10,000, in violation of 18 U.S.C. § 2 and 31 U.S.C. §§ 5313, 5322(b); and of fraudulent concealment and false statement of a material fact within the jurisdiction of a federal agency, in violation of 18 U.S.C. § 846, 18 U.S.C. § 371, 1001, 2(a) and 2(b).

The indictment contained 15 counts. Cuevas was found guilty on all counts. Cuevas was sentenced to ten years imprisonment for count one, and five years imprisonment for counts two, three, four, five, seven, nine and thirteen. The five-year terms are to run consecutively with the ten-year term.

A second five-year term was imposed for counts six, eight, ten, eleven, twelve, fourteen and fifteen; that term was suspended in favor of probation.

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Appeal is timely taken. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

I

We review de novo the alleged legal errors. *United States v. McConney*, 728 F.2d 1195, 1200-02 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). We shall reverse a jury verdict for insufficient evidence "only if no rational trier of fact could have found beyond a reasonable doubt that the defendant committed the offense in question." *United States v. Vaughn*, 797 F.2d 1485, 1489 (9th Cir. 1986). The evidence must be viewed in a light most favorable to the government, *United States v. Fleishman*, 684 F.2d 1329, 1340 (9th Cir.), *cert. denied*, 103 S. Ct. 464 (1982), and the government remains entitled to all reasonable inferences which may be drawn therefrom. *United States v. Price*, 623 F.2d 587, 591 (9th Cir.), *cert. denied*, 449 U.S. 1016 (1980).

Admission of expert testimony is a matter within broad discretion of the trial judge, not to be disturbed unless manifestly erroneous. *United States v. Fleishman*, 684 F.2d at 1335. We review denial of a continuance for abuse of discretion. *United States v. Gonzalez*, 800 F.2d 895, 898 (9th Cir. 1986). We review the double jeopardy claim de novo. *United States v. Ryland*, 806 F.2d 941, 942 (9th Cir. 1986).

II

Cuevas argues that insufficient evidence was introduced to support each of his convictions.

A

Cuevas argues that substantive Counts 5, 6, 8, 11, and 13 rest on insufficient proof that Guzman, a courier for Cuevas, failed to file CMIR's for international cash transfers. He

states that the government's search for CMIR's on the appropriate dates omitted Guzman's name.

In fact, trial testimony of two witnesses confirmed that a thorough search was conducted for CMIR's under Guzman's name. That search covered dates on which Guzman was alleged to have exported currency. The testimony corroborated a document in evidence showing a CMIR search in Guzman's name.[7]

B

Cuevas compares his conviction on substantive counts 7, 9, 12, and 14 (willful concealment of a material fact), under 18 U.S.C. § 1001, to *United States v. Woodward*, 469 U.S. 105 (1985). Cuevas argues that Guzman, one of his couriers, employed no "trick, scheme, or device" when he failed to file the required currency reports. Accordingly, he claims no willful concealment occurred.

Woodward does not assist Cuevas. The *Woodward* Court stated that absent a trick, scheme, or device in concealment of a material fact, a defendant's "conduct would not fall within 18 U.S.C. § 1001," *Id.* at 108. However, the Court also noted that a "false statement" is specifically punishable under 18 U.S.C. § 1001, *id.*, and implied that the Government was not required to prove the existence of a trick, scheme or device in such instance. *Id.* at 108-109.

In any event, circumstantial evidence, including Guzman's recurrent failure to file CMIR's for currency deliveries to Britain and Guzman's evasive behavior when detained, ade-

[7]A Customs officer, in whose authority CMIR searches are conducted, affirmed that a "diligent search" in Guzman's name produced no more than one currency report (CMIR). This CMIR was, in fact, filed late, only after Guzman's transport of currency on that date had been discovered.

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quately support the inference that Guzman was participating in a deceptive "scheme."[8]

Guzman's repeated contacts with Cuevas in London (and Los Angeles) and Guzman's reliance on Cuevas for airline tickets, as well as Cuevas' continuing, intimate contacts with Zawadski — who was arrested with Guzman in November 1984 — support the inference that Guzman was acting at Cuevas' direction.[9] Thus a rational juror could conclude that Guzman and Cuevas were concealing material facts from the government on the dates alleged. *See United States v. Des Jardines*, 747 F.2d 499 (9th Cir. 1984).[10]

C

Cuevas contends that insufficient evidence was offered to demonstrate that he knew shipments of small denomination United States currency, received from Zawadski (and earlier coordinated by Lozano from Miami and Onate from Mexico), were derived from narcotics.

[1] There is no dispute that where a defendant knowingly facilitates movement of money derived from narcotics out of the United States for narcotics traffickers, he can be found guilty of a conspiracy to aid and abet narcotics trafficking.

[8]Moreover, Guzman made false statements of material fact to Customs officials while trafficking in currency on at least two dates. The first was in September 1984, the second in November 1984. In November, Guzman claimed to be carrying only a few hundred dollars; when his suitcase was opened in front of him, it contained $516,000 in small bills. He then falsely stated that this was his first experience transporting currency out of the United States.

[9]Cuevas does not deny the connection to Guzman on appeal.

[10]Cuevas argues that *Des Jardines* is inapplicable, since Guzman was not accused in the indictment of false statements on the dates for which evidence exists to prove false statements (September 1, 1984 and November 30, 1984). This is factually inaccurate. The indictment alleged false statements on both dates.

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United States v. Dela Espriella, 781 F.2d 1432, 1436 (9th Cir. 1986); *see also United States v. Orozco-Prada*, 732 F.2d 1076, 1080 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984).

There is also no dispute that appellant deposited more than nineteen million U.S. dollars (in small bills) at British banks from May to November 1984, and that sufficient evidence was introduced to support the jury's finding of a conspiracy to sell narcotics.[11]

The only dispute is whether sufficient evidence was introduced to support the jury's finding that Cuevas knew that these vast quantities of small bills, which he regularly deposited at British banks, derived from the narcotics conspiracy.

[2] Once the government has proved that a narcotics conspiracy exists, "evidence of only a *slight connection* is necessary to convict a defendant of knowing participation in it." *United States v. Arbelaez*, 719 F.2d 1453 (9th Cir. 1983) (citing *United States v. Kenny*, 645 F.2d 1323, 1335 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981)) (emphasis added).

[3] Here, the requisite "slight connection" was established. Sufficient evidence was introduced to support a rational inference that appellant knew quantities of cash he deposited (and frequently wired back to the United States)[12] were derived from the narcotics conspiracy coordinated by Zawadski.

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[11]First, cash taken from Guzman and Zawadski was identified as "narcotics-scented" after a narcotics detection dog reacted to the bills. Second, Zawadski's ledger and other records comprehensively document sizable narcotics transactions, as well as sizable deliveries of narcotics-derived cash to Cuevas. Third, the "beeper system" utilized by Zawadski activated as DEA agents processed Zawadski's property; agreeing to meet a Zawadski operative, DEA agents were handed $300,000 cash in small bills, and subsequently seized cocaine and other narcotics distribution records. This is sufficient evidence of a narcotics conspiracy to uphold the jury's finding that a narcotics conspiracy existed. *See United States v. Vaughn*, 797 F.2d at 1489.

[12]Cuevas wired, for example, $230,000 from Citibank, London to Caribank, Miami; $50,000 from Republic Bank, London to Caribank, Miami;

Persuasive evidence, including a detailed accounts ledger, supports the jury's finding that Zawadski was assisted by Cuevas in coordinating cocaine transactions which generated millions of dollars in revenue.[13] The ledger indicates that the narcotics revenues were systematically dispatched to Cuevas, that Cuevas immediately deposited them, and that Cuevas (often with urgency) wired them back to a city in which Zawadski resided. Telephone records indicate Cuevas regularly communicated with Zawadski.

The ledger's accuracy is corroborated by testimony of couriers who met regularly with Cuevas at a London airport and delivered messages to Cuevas from Zawadski. The ledger's accuracy is also corroborated by telephone records of contact between Zawadski and Cuevas.

Zawadski's co-conspirators testified that he was involved in promoting the cocaine business and that he knowingly received as much as $5.5 million from a single narcotics trafficker.

When cocaine traffickers (such as Mastrangelo, Mestor, Arcela) needed contact with Zawadski, they utilized the "beeper system." The record shows that Cuevas was intimately familiar details of the narcotics conspiracy, such as use of the beeper system and Zawadski's whereabouts. Cuevas gave Zawadski's "beeper number," as well as instructions on when and how to contact Zawadski, to the cash cou-

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$1,866,000 to an American manufacturers Hanover Trust account; and $132,000 into an American Chemical Bank account. In aggregate, Cuevas wired money back to at least 29 American accounts and 14 American banking institutions.

[13]Detailed deposit information on Cuevas' London Citibank account, for example, appears in the Zawadski ledger.

riers. This beeper system was consistently employed by Zawadski to contact cocaine traffickers.[14]

The record also shows that Cuevas was integrally involved in and familiar with Zawadski's activities. Zawadski dispatched cocaine-derived monies through couriers Guzman,[15] Lozano, and Onate-Serrano, to Cuevas in London. The dispatches were recorded in Zawadski's ledger. Telephone calls from Zawadski to Cuevas timely preceded each cash shipment. Cash shipments between Zawadski and Cuevas originated in Miami and Los Angeles.[16] Zawadski rented an apartment in Miami. Cuevas listed Zawadski's apartment as his own personal address. Cuevas regularly wired large sums of money to Miami, generally the morning after money arrived from Zawadski. In 1984, Cuevas travelled with Zawadski. Together, they met Guzman in Los Angeles. Guzman became a knowledgable courier.

After Zawadski and Guzman were arrested on narcotics charges, Cuevas flew to Los Angeles seeking to make contact with Zawadski. Cuevas knew the location of Zawadski's apartment building. He took Spiteri there. Cuevas told Spiteri that, "Mr. Zawadski had a very special document from the Israelis" and that "the Palestinians are after him," because the document was valued at "a million dollar[s]". Implying that Cuevas might be recognized "by the Palestinians," he told Spiteri to go check to see if Zawadski was unaccompanied — in Mr. Spiteri's words, "because nobody knew me, but the Palestinians knew Mr. Gomez [i.e. Cuevas] . . . ." From this account alone, a rational juror could have concluded that Cuevas deliberately fabricated Zawad-

[14]The system fortuitously activated after being seized, leading DEA officers to an additional $300,000 and a cache of cocaine.

[15]Guzman himself made 39 trips in 1984-85, most into and out of Miami and Los Angeles.

[16]Previous cash shipments, involving Lozano, originated in Miami. Still other cash shipments, involving Ornate, originated in Mexico City.

A-14

ski's activities to shield Spiteri from knowledge that Cuevas' was aware of Zawadski's narcotics connection.

Cuevas repeatedly gave false accounts of his activities — to bank officials, to couriers, and to law enforcement officers — on matters and in ways which strongly support the inference that Cuevas knew the nature of the illegality in which he was the pivotal international participant.

First, Cuevas adopted a false name, "Hector Gomez," when meeting with Zawadski's couriers. A rational juror could infer from this that Cuevas knew the general nature of his activities.

Second, when questioned by bank officials about the source of his money, Cuevas cryptically ascribed millions of dollars in small bills to "family coffee" and "sugar" businesses. Citibank officials testified that, in their experience,[17] commodity accounts "never" transacted business in large quantities of small denomination bills. Citibank terminated the relationship.

The one alleged expert witness which Cuevas offered (on currency laws in Colombia) could not have explained the necessity for transporting United States dollars to Europe.[18] His other proffered Colombian witnesses demonstrated a consistent unwillingness to submit to depositions or to testify on Cuevas' behalf. Cuevas offered no credible evidence of another source — legal or illegal — for more than nineteen million U.S. dollars deposited at London banks, for payments to couriers, for intimate contact with Zawadski, for wiring money to cities in which Zawadski resided, and for making

[17]The Citibank witnesses had experience in dealing with accounts involving over 100 different commodities.

[18]In fact, the witness was proferred to discuss Colombian "currency controls" and their connection to U.S. currency, not the exchange of U.S. currency for British or Swiss currency.

A-15.

untruthful statements relating to Zawadski and to the source of the cash shipments.

Historically, the activities which Cuevas participated in and assisted in coordinating have provided strong indicia of narcotics-related money laundering.[19]

[4] Cuevas' fabrication, surreptitious attempts to make contact with Zawadski on learning of Zawadski's narcotics arrest, knowledge of Zawadski's residence, frequent telephone calls to Zawadski, intimate knowledge of Zawadski's communication system, a shared address with Zawadski in Miami, travels with Zawadski, transfers of money to Miami, possession of narcotics traffickers' telephone and beeper numbers (which also appeared in Zawadski's ledger), and

[19]The President's Commission on Organized Crime observed:

> Narcotics traffickers . . . often seek to change large amounts of cash received from 'street level' sales into an ostensibly legitimate form, such as business profits or loans, before using those funds for personal benefit or reinvesting them in new narcotics purchases and distribution . . . Law enforcement agencies recognize that narcotics traffickers, who must conceal billions of dollars in cash from detection by the government, create by far the greatest demand for money laundering schemes.

The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering, at 7 (Interim Report, Oct. 1984).

The Commission further observed that, "a narcotics trafficker who wishes merely to increase the immediate portability of his cash receipts can simply exchange smaller-denomination bills (e.g., one-, five-, and ten-dollar bills) for repeatedly larger-denomination bills. [O]rganized crime today uses banks and other financial institutions as routinely, if not as frequently, as legitimate businesses." *Id.* at 8. Finally, the Commission has noted that, "[s]ome $5-$15 billion of the $50-$70 billion in illegal drug money earned in the United States probably moves into international financial channels each year." *Id.* at 13. Other indicia of narcotics trafficking identified by the Commission include setting up "shell corporate entities," using couriers to avoid filing currency reports, and converting small-denomination bills into larger-denomination bills. *Id.* at 37. Cuevas' activities include all of those mentioned.

A-16

unsubstantiated, contradictory and discredited accounts of a coffee and sugar business, as well as a Colombian-United States currency laundering "business," suggest that Cuevas was intimately familiar with the nature of Zawadski's activities and was, therefore, a knowing participant in the narcotics conspiracy. We find the suggestion that Oscar Cuevas did not know his extensive money laundering was connected to the cocaine conspiracy overseen by his co-conspirator Zawadski untenable.

In view of Cuevas' diminished credibility,[20] his knowledge of operations extending beyond currency transactions, and his intimate relationship with narcotics trafficker Zawadski, we conclude that the requisite "slight connection" to the narcotics conspiracy has been established.

D

[5] Cuevas claims that insufficient evidence was introduced to support his conviction for conspiracy to avoid filing currency transaction reports with the United States government. (Counts 2, 3, 4)

[6] Specifically, he argues that insufficient evidence was presented of currency transfers exceeding $10,000 in one day or $100,000 in a twelve month period. In addition, he claims that all parties to the indictment constitute *one* financial institution, thus no transaction was completed in or out of his institution.

Title 18, U.S.C. § 371 proscribes two or more persons from conspiring to defraud the United States government.

[20]In addition to using the alias, lying to the couriers and bank officials, Cuevas initially swore in an affidavit that he had "never heard of" Zawadski or Guzman. Extensive corroborating testimony of Cuevas' co-conspirators contradicts this claim to ignorance.

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Title 31, U.S.C. § 5313(a) states that "[w]hen a domestic financial institution is involved in a transaction for the payment, receipt or transfer of U.S. coins or currency . . . in an amount prescribe[d] . . . by regulation, the institution . . . shall file a report . . . at the time and in the way the Secretary [of the Treasury] prescribes." (Emphasis added.)

Regulations pursuant to this statute require:

> [First,] each financial institution other than a casino shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

31 C.F.R. 103.22(a)(1); and

> [Second,] [a] financial institution [is defined as] [e]ach agency, branch, or office within the United States of any person . . . dealing in or exchanging currency . . . .

31 C.F.R. 103.11(e)(3).

Finally, 31 U.S.C. § 5322(b) provides that, "[a] person willfully violating this subchapter or a regulation prescribed under this subchapter . . . , while violating another law of the U.S. or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 5 years, or both."

[7] In general, we have held that, "the government must produce evidence of a physical 'transaction in currency.' " *United States v. Mouzin*, 785 F.2d 682, 690 (9th Cir. 1986) (citing 31 C.F.R. § 103.11).

A-18

[8] Overwhelming evidence supports the finding that individual, international transfers to Cuevas regularly exceeded $10,000. Between May and November 1984, Cuevas deposited at least $19 million in London banks. This cash in-flow disaggregates to a minimum daily deposit of $156,000, divided across that five month period. Moreover, Spiteri testified to having delivered nearly $900,000 to Cuevas in November 1984. Finally, on November 30, 1984, Zawadski and Guzman were arrested with $516,000, enroute for London; Guzman was connected to Cuevas by repeated prior visits and their close relationship with Zawadski.

In his challenges, Cuevas overlooks essential language in the relevant regulations:[21]

Title 31, C.F.R. § 103.22(a)(1) requires a financial institution to file a report for "each . . . payment or transfer by, through, or to such financial institution . . . ." 31 C.F.R. § 103.11(e)(3) states that "[e]ach agency, branch, or office within the United States of any person . . . dealing in currency . . ." shall qualify as a "financial institution."

[9] Thus, even if the transfers were between separate "branches or offices" of the Cuevas-Zawadski operation, they were transfers between legally distinct "financial institutions," and were thus subject to the reporting requirements of 31 C.F.R. 103.11(e)(3). If they were merely within the Cuevas organization, they qualified as transfers "through" the "financial institution," and were thus subject to the reporting requirements of 31 C.F.R. 103.22(a)(1).

Accordingly, sufficient evidence was presented of (1) physical currency transactions (2) exceeding $10,000 and (3)

[21] 31 C.F.R. § 103.11(e)(3) and 31 C.F.R. 103.22(a)(1).

involving Cuevas' financial institution for conviction under 18 U.S.C. § 371 and 31 U.S.C. § 5313(a) (counts 2, 3, 4).[22]

III

Cuevas claims that counts 2 through 15 must be dismissed, since he was not extradited for trial on these counts.

Citing the "doctrine of speciality" and the Swiss extradition order, Cuevas argues that he should not be held accountable for currency-related offenses, since these offenses fall within the "fiscal acts" for which prosecution was enjoined by Swiss authorities.

[10] "The doctrine of 'speciality' prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state

[22]Cuevas asserts that the jury instruction was confusing since it failed to "contain even a hint that it was the exchange between the customer and the financial institution that needed to be reported to prove that [exchanges in excess of $10,000 took place on a single day]."

First, as explained *supra, see Section D,* substantial evidence supports the conclusion that amounts exceeding $10,000 were transferred to Cuevas in a single day and amounts exceeding $100,000 were transferred to him between May and December 1984. Thus, transfers occurred which satisfied the statutory requirement of $100,000 within a "twelve month" period.

Second, transfers "through" the Cuevas financial institution, as well as transfers among independent "agencies, offices, or branches" — each qualifying as a "financial institution" within the meaning of 31 U.S.C. § 5313(a) and 31 C.F.R. 103.11(e)(3) — eliminate any need for discussion of transactions between outside "customers" and the "financial institution(s)."

Finally, we evaluate jury instructions "in the context of the overall charge to the jury as a component of the entire trial process," *Bashor v. Risley,* 730 F.2d 1228, 1239 (9th Cir. 1982), *cert. denied,* 469 U.S. 838 (1984), and reverse only if the instruction is plainly erroneous. *United States v. Nace,* 561 F.2d 763 (9th Cir. 1977). The instruction was not plainly erroneous in the context of the entire jury charge and trial process. *Nace,* 564 F.2d at 763.

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agreed to extradite." *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir. 1986).

The doctrine is based on principles of international comity. To guarantee limited prosecution by nations seeking extradition of persons from the United States, the United States has guaranteed, pursuant to treaty, that it will honor limitations placed on prosecution in the United States.

In cases involving Switzerland, the relevant treaty provides: "No person surrendered by either of the Contracting States to the other shall be prosecuted or punished for any offense, committed before the demand for extradition, other than that for which the extradition is granted . . . ." *Treaty on Extradition U.S.-Switzerland*, May 14, 1900, 31 Stat. 1928, T.S. No. 354, Art. IX.

Since we observe the doctrine of "speciality," *United States v. Najohn*, 785 F.2d 1420 (9th Cir. 1986), we consider the Swiss extradition order binding.

A person extradited may raise whatever objections the extraditing country would have been entitled to raise. *Najohn*, 785 F.2d at 1422. Accordingly, we consider the Swiss court's restrictions in the absence of a Swiss objection to the United States prosecutor's interpretation.[23]

[23]We note that "[a]s a matter of international law, the principle of speciality has been viewed as a privilege of the asylum state, designed to protect its dignity and interests, rather than a right accruing to the accused." *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir.) (Friendly, J.), *cert. dismissed*, 414 U.S. 884 (1973); *see also United States ex rel. Donnelly v. Mulligan*, 76 F.2d 511 (2d Cir. 1935); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583-84 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1198 (1986); *Bergenguer v. Vance*, 473 F. Supp. 1195, 1197 (D.D.C. 1979). We, however, adhere to the opposing position, allowing petitioner to raise claims which might have been raised by the asylum state. *Najohn*, 785 F.2d at 1322.

A-21

In this case, unfortunately, the Swiss extradition order is a study in ambiguity.[24]

[11] The order clearly states that Cuevas is to be extradited on the fifteen-count indictment, including currency violation counts 2-15. However, appended to the order is "an injunction to the effect that no prosecution or punishment must take place because of the fiscal aspect of the factual circumstances of the indictment."[25] Cuevas claims that this "injunction" was intended to prevent prosecution on currency violations adjunct to the narcotics conspiracy.

The term "fiscal aspects" is not defined anywhere in the Swiss order. Other passages, however, shed light on the Swiss court's intent. On page one of the (29-page) order, the Swiss court observed that Zurich authorities had opened two cases against Cuevas, one "because of financing illegal activities in narcotics trading," a second "for collection of wrongfully obtained capital gains."

The second prosecution, relating to taxes, provides the most obvious referent for the term "fiscal aspects."

Such a construction of "fiscal aspects" (relating to taxes or financial penalties) is supported by the following central, but ambiguous passage of the extradition order:

> In order to obviate any misunderstanding whatsoever, it should be reiterated here nevertheless, that the prosecution of complainant remains admissible to the full extent of the indictment because of his activity in connection with drugs, so that, in any event, the money hauls effected by couriers acting under his orders would — from this visual angle —

[24]The order was either drafted without a robust understanding of American syntax or was subject to awkward translation.

[25]Language taken from the Swiss Extradition Order.

A-22

> not have to remain without consideration. The order will have to state only that with regard to these hauls, no taxes or fees or any fiscal penalties shall be imposed as well as that if there is any penalty for the non-fiscal delict conduct, same shall not be increased in consideration of the fiscal set of facts.

[12] From this passage, we cautiously extract the following conclusions: First, the Swiss do not oppose "prosecution . . . to the full extent of the [fifteen count] indictment." Second, the "money hauls" or transactions of currency derived from narcotics should not "remain without consideration;" that is, they *should be* considered. Third, prosecution for the "hauls" themselves should not lead to the payment of "taxes or fees or any fiscal penalties"; nor should "taxes, fees, or fiscal penalties" relating to the "money hauls" be imposed surreptitiously through narcotics conspiracy penalties. Such a reading is consistent with the definition of "fiscal aspects" as tax-related.[26]

The order also acknowledges that counts 2-15 involved "transporting proceeds from drug dealings without a permit," suggesting that the Swiss court never intended to sever the currency violation counts from the narcotics conspiracy count. With specific reference to "drug money laundering," defined in the order as "the supplementary investing, transporting [hauling and] changing of monies derived from the drug trade," the Swiss court states that it is "not inclined . . . to interpret . . . [language relating to drug trade] financing in a restrictive way."[27]

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[26]Specifically, financial penalties for illegal "capital gains."

[27]In addition, Cuevas claims that, in the absence of proof that he financed the conspiracy, he cannot be prosecuted within the meaning of the Swiss extradition order, since the indictment was based, in part, on this assertion. Ample evidence supports the finding that Cuevas repeatedly transferred large sums of money from Europe to the United States, supporting the inference that he assisted in financing the conspiracy. Second, the

[13] Since the appropriate test is whether the extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited, *United States v. Paroutian*, 299 F.2d 486, 491 (2d Cir. 1962), and since the Swiss court consistently characterizes the narcotics and currency reporting conspiracies as integrally related, we hold that the doctrine of "speciality" is not violated by Cuevas' conviction on counts 2-15.

IV

Cuevas argues that expert testimony of a government Customs agent allowed hearsay evidence to prejudice the verdict.

We do not disturb a trial court's ruling on expert testimony unless that ruling is manifestly erroneous. *Fleishman*, 684 F.2d at 1329.

The record indicates that Agent Marcello was an expert in his field[28] and that his testimony was cumulative, presenting a summary of admitted evidence and referring to information within his special knowledge as a DEA and Customs agent. We have recently permitted summary testimony under simi-

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Swiss order states that, although Swiss law "require[s] an exact presentation of the offense the defendant is being charged with . . . , the question is not that the act of crime . . . would have to be proven."

Finally, the Swiss court implied that the acts Cuevas now terms "unlawful fiscal acts [i.e. export of foreign currency without a permit . . .]" were not acts of a "fiscal nature." Alternatively, if such acts were of a "fiscal nature," the order states that the "fiscal aspect" was "shedding much of its importance . . . [in light of] the entire series of facts being the subject of the extradition."

[28]Agent Marcello had arrested 135 domestic narcotics violators and 99 international couriers in narcotics currency during 13 years with the DEA and 2 years with U.S. Customs; he had assisted in the arrest of over 400 narcotics smugglers in 15 years of law enforcement.

A-24

lar circumstances. *United States v. Marchini*, 797 F.2d 759, 765 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1222 (1987).

Although the agent appears to have relied on hearsay testimony in formulating a portion of his expert opinion, such a reliance does not require reversal. *See* Fed. R. Evid. 703; *see also United States v. Sims*, 514 F.2d 147 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975). Since the evidence of narcotics and currency transaction conspiracies is overwhelming, even absent the agent's testimony, we find that any possible prejudice was harmless.

V

Cuevas argues that the trial court abused its discretion by refusing to grant a second continuance, by refusing to grant a late request to take foreign depositions, and by excluding a witness on Colombian currency law.

A

We review denial of a continuance for "clear abuse of discretion." *United States v. Gonzalez*, 800 F.2d 895, 898 (9th Cir. 1986). Since Cuevas does not make a "specific showing of prejudice," *Polizzi*, 801 F.2d 1543, 1559; *Gonzalez*, 800 F.2d at 898, and since continuances are generally not favored in the absence of "compelling reasons," *Morris v. Slappy*, 461 U.S. 1, 11 (1983), denial of the second continuance does not constitute an abuse of discretion.

B

Denial of a request to take foreign depositions[29] is reviewed for abuse of discretion. *United States v. Peterson*, 812 F.2d 486, 494 (9th Cir. 1987).

[29]See Fed. R. Crim. P. 15(a).

A-25

Cuevas was arrested in April 1985, indicted in September 1985, and arraigned in June 1986. His first trial date was set for July 22, 1986. The government tendered most discovery material by June 12, 1986.

When Cuevas requested a continuance to seek foreign depositions and prepare pretrial motions, the court granted his request. The court set a second trial date for September 2, 1986. That date, at the government's request, was made firm to guarantee commitments from the government's foreign witnesses.

Five days before trial, Cuevas requested a second continuance and leave to take foreign depositions.

In light of unexplained reticence among Cuevas' witnesses to testify on his behalf, the inconvenience to foreign government witnesses of repeated rescheduling, Cuevas' extended opportunity for depositions prior to his second request for continuance, the government's prompt response to discovery, and death threats against government witnesses, the trial court did not abuse its discretion in denying Cuevas' late request to take foreign depositions.

C

The decision not to permit an expert witness to testify will not be disturbed unless manifestly erroneous. *United States v. Langford,* 802 F.2d 1176, 1179 (9th Cir. 1986). A trial judge has considerable discretion in determining whether the jury will be assisted or confused by the proffered testimony.

Cuevas offered an "expert" witness without evidentiary foundation. The witness admitted possessing no knowledge of currency laws or transactions involving London, Zurich and the United States, no knowledge pertaining to "money laundering," and no knowledge of Cuevas or of Cuevas' activities. The witness was proffered to testify only on currency

exchange law in Colombia. The trial judge found this proposed testimony not relevant and also potentially confusing. On review of the record, we cannot conclude that the district court's finding was manifestly erroneous. *Langford,* 802 F.2d at 1179.

VI

Cuevas argues that, by imposing cumulative sentences for narcotics and currency reporting conspiracies, the trial court violated his Fifth Amendment right against double jeopardy.

While proof of Cuevas' two conspiratorial crimes overlaps substantially,[30] the test set out in *Blockburger v. United States,* 284 U.S. 299, 304 (1932), for establishing a violation of double jeopardy has not been met.

[14] The Supreme Court has held that, "notwithstanding a substantial overlap in the proof offered to establish the crimes," *Albernaz v. United States,* 450 U.S. 333, 338 (1981); *see also United States v. Gonzalez,* 800 F.2d at 897, two offenses are not the same offense for double jeopardy purposes if "each provision requires proof of an additional fact which the other does not." *Blockburger,* 284 U.S. at 304; *United States v. Ryland,* 806 F.2d at 942-43.

The narcotics conspiracy alleged in count 1, 21 U.S.C. §§ 841, 846, required proof, inter alia, of intent to possess and to distribute cocaine.

The currency transactions conspiracy alleged in count 2, 18 U.S.C. § 371, required proof, inter alia, of unreported currency transactions exceeding $10,000 a day, $100,000 in a twelve-month period, and knowing transportation of currency out of the United States.

[30]Permitting them to be closely related for the purposes of the Swiss extradition order.

A-27

[15] Thus, count 2 did not require proof of intent to possess or distribute cocaine, and count 1 did not require proof of unreported currency transactions exceeding $10,000 a day or $100,000 in a twelve-month period. Nor did count 1 require proof of knowing transportation of currency out of the United States. Consequently, neither count is a lesser included offense of the other.

For the opposing proposition, Cuevas refers this court to *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *United States v. Solano*, 605 F.2d 1141, 1144 (9th Cir. 1979); and *United States v. Castro*, 629 F.2d 456, 461 (7th Cir. 1980). In each of these cases at least one of two convictions did not "require[ ] proof of an additional fact" to secure the other. *Blockburger*, 284 U.S. at 304.[31] In this case, the same cannot be said. The double jeopardy clause is not violated by Cuevas' cumulative sentences.

VII

Sufficient evidence supports each count on which Cuevas was convicted. Applying the doctrine of "speciality," we conclude that Cuevas was not tried on any charge for which he was not extradited. Expert testimony introduced against Cuevas was neither unfairly prejudicial nor otherwise impermissible. The trial court's denial of Cuevas' second request for continuance, denial of leave to take foreign depositions, and exclusion of Cuevas' witness on Colombian currency law do not represent manifest error. Cuevas' cumulative sentences, evaluated under the *Blockburger* test, do not violate double jeopardy.

AFFIRMED.

[31]Reliance on *Jeffers v. United States*, 432 U.S. 137 (1977), is similarly misplaced. The *Jeffers* Court failed to reach the question whether the two cumulative prison sentences violated double jeopardy. *See also, United States v. Ryland*, 806 F.2d at 942.

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FERGUSON, Circuit Judge, dissenting:

I disagree with the majority's conclusion that the district court did not abuse its discretion by refusing to allow Cuevas' expert witness to testify, and therefore I dissent.

Cuevas was charged with violating narcotics and currency reporting laws. The district court found that the testimony of an expert witness proffered by Cuevas would be irrelevant to the issues in the case and would not help the jury reach a verdict. Given the facts at issue in the case, however, the testimony was clearly relevant and material to Cuevas' defense. Thus the district court's conclusion could only have been predicated on an assumption favoring the government, which resolved a key disputed fact. This violates foundational principles of our system of justice, grounded in the Fifth and Sixth Amendments of the Constitution: that the defendant has the right to present a defense to the charged offenses, and that the defendant has the right to present the testimony of favorable witnesses. Cuevas was denied these rights, and he is entitled to a new trial.

While the district court has broad discretion to determine whether evidence is relevant, that discretion "is limited by the [defendant's] due process right to present a defense and his Sixth Amendment right of confrontation." *United States v. Whitman*, 771 F.2d 1348, 1350 (9th Cir. 1985).

> The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defense's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967); *see also Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The right[ ] . . . to call witnesses in one's own behalf [has] long been recognized as essential to due process."). Thus, "criminal defendants have . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 1001 (1987) (footnote and citations omitted).[1]

The narcotics conspiracy charge against Cuevas was based on allegations that he made numerous currency transactions as part of a scheme to launder drug money. It must be remembered that currency exchange is not illegal per se. *United States v. Dela Espriella*, 781 F.2d 1432, 1436 (9th Cir. 1986) ("money laundering itself is not a crime, and the mere fact that a person launders monies derived from narcotics activities does not make the launderer part of a conspiracy to violate the narcotics laws."); *cf. United States v. Orozco-Prada*, 732 F.2d 1076, 1081 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984).

Cuevas' defense was that he was engaged in a legitimate currency exchange service for Colombian businesses. Cuevas sought to put before the jury the testimony of a witness, Professor Gerald Nickelsburg, with expertise in the currency controls of South American countries and the international transactions necessitated by those controls. This testimony was material to establishing Cuevas' defense that the laundered funds had a non-narcotic origin. The district court, however, determined that the witness' intended testimony was irrelevant.

[1]We have previously recognized this right in holding that the Sixth Amendment guarantee of compulsory process for obtaining the testimony of favorable witnesses, "prevents the state from arbitrarily excluding such testimony." *Perry v. Rushen*, 713 F.2d 1447, 1450 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984).

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The district court concluded that the testimony Nickelsburg would give was irrelevant because "this case involves only money transactions in the United States, the United Kingdom and Switzerland. There has been no evidence of any money transactions originating in any of the South American Latin American countries." Aside from the inaccuracy of the judge's latter statement,[2] the location of the transactions is neither the only, nor the only significant, fact in this case. Proof that the money was derived from drug sales, and that the defendant had knowledge of that fact, were relevant to at least four counts in the indictment.[3] Thus, it was the government's theory that Cuevas knowingly exchanged currency derived from the sale of illicit drugs in the United States.[4] Ergo, while the reporting violations may have occurred in the United States and Europe, the impetus for the currency transactions—since it would be indicative of Cuevas' knowledge and intent as to the origin of the money—was unavoidably a central issue in the case.

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[2]At least one witness, Patricia Villa, testified regarding currency transactions that originated in Colombia.

[3]The drug "connection" is arguably essential to all counts. The Swiss extradition order precludes prosecution on purely "fiscal" matters. This arguably would include offenses focused on currency exchange transactions lacking a tie to illicit narcotics activities.

[4]In supporting its decision, the majority often refers to Mr. Zawadski, allegedly a key operative in a complex scheme to launder money derived from the sale of cocaine in the United States. In this regard, the majority implies that Zawadski was Cuevas' "right-hand man", acting at Cuevas' direction. Such suggestions constituted an essential part of the government case that Cuevas had knowledge of and intent to further a criminal narcotics conspiracy. It is noteworthy, however, that Zawadski was not presented as a witness by the prosecution at Cuevas' trial. In his own prosecution, Zawadski consistently maintained that he did not know that some of the money he transported came from drug sales. Thus the government was unable to show that Zawadski had ever stated or even implied that Cuevas had knowledge that any of the currency he exchanged had illicit origins. Moreover, none of the witnesses presented at trial testified that they had ever discussed with Cuevas or overheard him speak of the money having illicit origins. In fact, there was no direct evidence offered at trial that Cuevas had culpable knowledge or intent.

The majority concludes that the expert witness proffered by Cuevas "could not have explained the necessity for transporting United States dollars to Europe." At a minimum, this is a speculative conclusion since the witness was never given an opportunity to explain Colombian currency controls, which could render such transport a means of easing compliance with those controls. At a maximum, the conclusion is totally erroneous because defense counsel offered Nickelsburg to testify about legal activities with regard to the purchase of currencies, the access of South American businesses to United States currency within countries such as Colombia where currency controls exist, why those controls necessitate obtaining cash from companies and locations outside of those countries, the manner in which U.S. currency can be obtained for those companies, as well as general business policies in Europe as they relate to South American countries and businesses.[5] Thus, Nickelsburg could have provided a legitimate and non-criminal explanation for Cuevas' currency exchange activities.[6] By excluding Nickelsburg's testimony, the district court deprived Cuevas of his fundamental right to

[5]In addition, the majority states that other than the expert witness, "Cuevas offered no credible evidence of another source—legal or illegal" for his activities, and implies that this is further evidence of his guilt. The majority thus finds significance in a dearth of evidence that there was a non-narcotic source for the money exchanged under Cuevas' direction. Cuevas attempted to present his defense—that he was engaged in a legitimate currency exchange service because Colombian currency restrictions encouraged such exchange, and that he understood the money he exchanged to have been proceeding from legitimate Colombian businesses—but was prevented from doing so by the district court.

[6]Establishing a specific criminal impetus for the currency transactions lies at the heart of the conspiracy offense. Nickelsburg was to have testified regarding one reason for the events and transactions that the government alleged to be part of a criminal conspiracy. However, the court did allow, over objection, testimony regarding a different explanation for the transactions from the government's expert witness. The witness, DEA Agent Marcello, testified as to the common operations and methods of narcotics money laundering. The district court's determination that Nickelsburg's testimony was irrelevant could only have been made if it first assumed that that the origin of the funds and reason for their exchange had been established, i.e., that Cuevas was not engaged in legitimate currency exchange, but rather knowingly facilitated the laundering of money derived from drug sales in the United States. That the court in fact made such an assumption is supported by its allowing Marcello's, but not Nickelsburg's, testimony.

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defend against the offenses alleged in his indictment.

While "some constitutional errors . . . are so unimportant and insignificant that they may . . . be deemed harmless, not requiring the automatic reversal of the conviction," *Chapman v. California*, 386 U.S. 18, 22 (1967), the constitutional violations in this case are fundamental. I would reverse Cuevas' conviction and remand for a new trial.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed
Aug 30 1988
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES OF AMERICA,	)	
	)	C.A. No.
Plaintiff-Appellee,	)	87-5007
	)	
-against-	)	D.C. No.
	)	CR-85-0919-R
OSCAR FERNANDO CUEVAS,	)	
	)	ORDER
Defendant-Appellant.	)	
	)	

Before: ALARCON, FERGUSON and BEEZER, Circuit Judges

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Ferguson voted to grant the petition for rehearing and recommended that the suggestion for rehearing en banc be rejected.

The full court has been advised of the suugestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

SUPREME COURT OF THE UNITED STATES

No. A-306

Oscar Fernando Cuevas,

Petitioner

v.

United States.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 28, 1988.

s/Sandra D. O'Connor
Associate Justice of
the Supreme Court of
the United States

Dated this 18th
day of October, 1988.

(2)

FILED
JAN 31 1989

No. 88-887

In the Supreme Court of the United States

OCTOBER TERM, 1988

OSCAR FERNANDO CUEVAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction on counts charging him with concealment of a material fact, in violation of 18 U.S.C. 1001.

2. Whether the district court abused its discretion in admitting testimony by the government's expert witness.

3. Whether the district court abused its discretion in excluding the proffered testimony of petitioner's expert witness.

4. Whether the court of appeals made factual errors in its opinion and relied on evidence that was not in the record in affirming petitioner's conviction.

5. Whether the evidence was sufficient to sustain petitioner's conviction on counts charging him with failing to file currency transaction reports (CTRs), in violation of 31 U.S.C. 5313.

6. Whether cumulative penalties may be imposed on counts charging conspiracy to possess and distribute cocaine and conspiracy to violate the currency reporting requirements.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-887

OSCAR FERNANDO CUEVAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A33) is reported at 847 F.2d 1417.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1988. A petition for rehearing was denied on August 30, 1988 (Pet. App. A34-A35). On October 18, 1988, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 28, 1988, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was con-

victed of conspiracy to aid and abet the possession and distribution of cocaine, in violation of 21 U.S.C. 846 (Count 1); conspiracy to fail to report a transaction involving in excess of $10,000 of United States currency, in violation of 31 U.S.C. 5316 (Count 2); failure to report currency transactions in excess of $100,000 in a 12-month period, in violation of 31 U.S.C. 5313 and 5322(b) (Counts 3 and 4); failure to report the export of more than $5,000 in United States currency, in violation of 31 U.S.C. 5316(a)(1)(A) (Counts 5, 6, 8, 10, 11, 13 and 15); and aiding and abetting the fraudulent concealment, by trick, scheme, and device, of a material fact within the jurisdiction of the United States Customs Service, in violation of 18 U.S.C. 1001 (Counts 7, 9, 12, and 14). Petitioner was sentenced to a total of 15 years' imprisonment: 10 years' imprisonment on Count 1, to be followed by concurrent terms of five years' imprisonment on Counts 2, 3, 4, 5, 7, 9, and 13. On the remaining counts, execution of sentence was suspended in favor of probation. The court of appeals affirmed in a divided opinion. Pet. App. A1-A33.

1. The evidence at trial showed that petitioner operated a money laundering service for cocaine distributors. Petitioner's agents received more than $23 million in proceeds from narcotics dealers in the United States. Those agents transported the currency to petitioner in Switzerland and London, where he deposited the money in foreign banks. Gov't C.A. Br. 7.

In 1983, petitioner induced Brinks International Courier Services to send seven cash shipments from Miami to Switzerland without filing the necessary customs declarations. Petitioner misled Brinks by claiming that the bags contained promissory notes and negotiable instruments. Using the alias "Hector Gomez," petitioner received the shipments in Switzerland. On December 9, 1983, a

customs official opened one of the Brinks bags and found $240,000 in cash. Following that discovery, petitioner promptly abandoned his Zurich and Miami offices and left no forwarding address. Gov't C.A. Br. 2-4.

In December 1983, petitioner leased two offices in Mexico City. From April 1984 to April 1985, petitioner employed couriers who listed the Mexico City offices as their addresses. During that period, the couriers brought millions of dollars from the United States to petitioner in London. Petitioner opened an account at Citibank in London in June 1984. Thereafter, he regularly brought to the bank suitcases containing up to $1 million in small United States bills for deposit. The morning after each deposit, petitioner would wire the money back to United States banks. Petitioner told Citibank officers that the deposited cash came from his family's coffee and sugar business. The officer in charge of petitioner's account, however, had handled more than 100 commodities-related accounts, and none of those accounts had involved large transactions in cash. Because Citibank was suspicious about the source of the funds, it terminated its relationship with petitioner in November 1984. During the five-month period that the account was open, petitioner laundered $19 million in cash through Citibank London. Thereafter, he laundered an additional $4.4 million in currency through Republic National Bank in London. Gov't C.A. Br. 4-7.

On April 8, 1984, British customs officers detained one of petitioner's couriers after finding $177,000 in his suitcase. An unfiled Currency Monetary Instrument Report (CMIR) was attached to the currency. Another courier, Charles Spiteri, made deliveries of $400,000 and $494,000 to petitioner in London in November 1984. On neither occasion did the courier file a CMIR. Petitioner paid Spiteri $400 for each delivery. Another courier, Carlos Guzman,

made 39 trips between Europe and the United States on petitioner's behalf. Guzman was arrested on November 30, 1984, at the Los Angeles airport while attempting to board an international flight with $516,000 in drug-scented cash. Before the cash was discovered, Guzman told a Customs officer that he was carrying only a few hundred dollars in cash. Gov't C.A. Br. 5, 6, 9, 10.

Petitioner regularly purchased the airline tickets for his couriers shortly before their planes were scheduled to depart from Heathrow Airport in London. Using the name "Hector Gomez," he paid for the tickets in cash. Petitioner also paid the couriers' hotel bills and paid for their entertainment while they were in London. Gov't C.A. Br. 6 n.5, 9.

Ernesto Zawadzki was petitioner's primary link between the drug traffickers and the couriers. Zawadzki obtained the drug money from the traffickers and sent the cash to petitioner through petitioner's couriers. Zawadzki telephoned petitioner in London almost every time that he dispatched a courier to petitioner. Zawadzki was arrested with Guzman at the Los Angeles airport on November 30, 1984. Following his arrest, a drug trafficker signaled Zawadzki on the beeper. A DEA agent answered the call and, pursuant to the instructions of the trafficker, picked up a diaper box containing $300,000 in small bills. Thereafter, agents arrested the trafficker and found records of his narcotics business and more than a kilogram of cocaine in his house. Gov't C.A. Br. 7-8.

On the day after Zawadzki's arrest, agents seized more than $1 million in drug-scented cash from Zawadzki's apartment. In an attempt to beat the agents to the cash, petitioner flew on the Concorde supersonic jet from London to New York and then on to Los Angeles. He told Spiteri that he had to retrieve from Zawadzki's apartment

a document worth $1 million that was wanted by the Palestinians. Petitioner alleged that Zawadzki's life was in danger. When petitioner and Spiteri arrived at Zawadzki's building, petitioner asked Spiteri to see if any Palestinians were near the apartment. Spiteri saw several federal agents outside the apartment and reported to petitioner that they did not appear to be Palestinian. Petitioner replied that "these people hire mercenaries to do their jobs, you know"; he and Spiteri then left the building. Spiteri did not see petitioner again.[1] Gov't C.A. Br. 11-13.

Petitioner was arrested on April 11, 1985, in Zurich. The authorities seized from him a phone book containing the beeper numbers used by the narcotics traffickers and an address book containing the names and numbers of petitioner's couriers. The authorities also seized an altered Colombian passport in the name "Hector Gomez" to which petitioner's photograph was affixed. In addition, they seized a number of CMIRs signed by "Hector Gomez." Gov't C.A. Br. 13.

2. The court of appeals affirmed petitioner's conviction. The court first held that the evidence was sufficient to show that Guzman, as a courier for petitioner, failed to file CMIRs for the cash that he transported to London. The court observed that the trial testimony of two witnesses confirmed that a thorough search was conducted for CMIRs under Guzman's name covering the dates on which Guzman exported currency. Pet. App. A9-A10. The court also sustained petitioner's conviction on the counts charging that Guzman had concealed a material fact when he failed to file the required CMIRs, in violation of 18 U.S.C. 1001. The court held that whether or not it was

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[1] The following week, however, petitioner called Spiteri and told Spiteri that Zawadzki was fine and that the people outside Zawadzki's apartment were his friends.

necessary to prove a "trick, scheme, or device" to sustain a concealment conviction under Section 1001, a deceptive scheme was shown here: the court found that Guzman's recurrent failure to file CMIRs, his evasive behavior when detained, his reliance on petitioner for airline tickets, and petitioner's continuing close contacts with Zawadzki, sufficiently demonstrated that both petitioner and Zawadzki were participating in a deceptive scheme to conceal the export of United States currency. Pet. App. A10-A11.

The court of appeals also rejected petitioner's argument that he was not required to file CTRs because the transfers of cash were wholly within his money laundering organization, which he conceded was a "financial institution" as that term is defined in the pertinent regulations. The court noted that even if the transfers were viewed as "merely within [petitioner's] organization, they qualified as transfers 'through' the 'financial institution,' and were thus subject to the reporting requirements of 31 C.F.R. 103.22(a)(1)." Pet. App. A19-A20.

The court held that the district court did not abuse its discretion in allowing Customs agent Marcello to summarize the evidence for the jury and to refer to information within his special knowledge as a DEA and Customs agent. Pet. App. A24. Further, the court held that even if it was error for the agent to rely on hearsay evidence for a portion of his expert opinion, that error did not require reversal because the evidence against petitioner was overwhelming and any possible prejudice was harmless. *Id.* at A25.

The court also sustained the district court's exclusion of the proffered testimony of petitioner's expert witness on the ground that the testimony was confusing and irrelevant. The court observed that the witness proposed to testify only about the currency exchange laws in Colom-

bia. The expert admitted that he knew nothing about the currency laws governing transactions in London, Zurich, or the United States. He also admitted that he had no knowledge pertaining to money laundering and no knowledge of petitioners' activities. Pet. App. A26-A27.

Finally, the court held that the cumulative penalties imposed on the two conspiracy counts did not violate the Double Jeopardy Clause. The narcotics and currency reporting conspiracies were not the same for double jeopardy purposes, because each required "proof of an additional fact which the other does not." Pet. App. A27, quoting *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Unlike the narcotics conspiracy, the currency reporting conspiracy required proof of transactions exceeding $10,000 per day or $100,000 per year, and the knowing transportation of currency outside the United States. And although the narcotics conspiracy required proof of an intent to possess or distribute cocaine, the currency reporting conspiracy did not. Pet. App. A27-A28.

Judge Ferguson dissented. In his view, the district court should have permitted petitioner's expert witness to testify.

ARGUMENT

1. The court of appeals correctly rejected petitioner's claim (Pet. 14-19) that the evidence was insufficient to sustain his conviction on the counts charging that he aided and abetted his courier Guzman in concealing the exportation of United States currency by means of a "trick, scheme, or device," in violation of 18 U.S.C. 1001. The evidence showed that Guzman filed the required CMIR only once. The evidence also showed that on two occasions, Guzman lied about complying with the currency

reporting laws. See Gov't C.A. Br. 26-28 n.27. From this fact, the jury could infer that Guzman deliberately concealed the exportation of cash on other occasions and that he was part of a larger money laundering scheme. Moreover, the jury could properly infer from the fact that petitioner had deceived Brinks in 1983 regarding the nature of its cargo that deliberate concealment was a part of petitioner's ongoing scheme. The deliberate concealment continued in 1984 when Guzman made 39 trips to Europe on petitioner's behalf. Petitioner's use of an alias and his payment in cash for the tickets of his couriers are also affirmative acts of deception that he used to facilitate his scheme to conceal the exportation of cash. Gov't C.A. Br. 4-7.

Petitioner's conviction on the Section 1001 counts is consistent with this Court's decision in *United States* v. *Woodward*, 469 U.S. 105 (1985). In *Woodward*, the defendant falsely answered "no" on a form asking whether he was carrying more than $5,000 in currency upon entering the United States. He was convicted of making a false statement, in violation of Section 1001, and of willfully failing to report that he was carrying in excess of $5,000 into the United States, in violation of 31 U.S.C. 1058 and 1101. The only question before the Court was whether the two offenses were the same for double jeopardy purposes. The Court held that they were different because Section 1001 reaches persons who conceal a material fact by any "trick, scheme, or device." 469 U.S. at 108. The Court explained that an individual could violate the currency reporting statute by failing to file the necessary report upon entering the United States even though he was prepared to answer any questions truthfully. But he could not be convicted of concealing a material fact by any "trick, scheme, or device" as long as he intended to answer questions truthfully, if asked.

The evidence in this case showed that Guzman was quite different from the hypothetical traveler in *Woodward*, who was prepared to answer questions truthfully. For the same reason, the decision below does not conflict with the decisions of the Fifth and Eighth Circuits in *United States* v. *London*, 550 F.2d 206 (5th Cir. 1977), and *United States* v. *Shannon*, 836 F.2d 1125 (8th Cir. 1988), cert. denied, No. 87-6952 (June 13, 1988). In *London*, the court held that Section 1001 requires the government to prove "that the material fact was affirmatively concealed by ruse or artifice, by scheme or device." 550 F.2d at 214. In *Shannon*, the court held that "passive acquiescence" is not sufficient to prove a concealment offense under Section 1001. 836 F.2d at 1130.

In this case, the government proved that Guzman and petitioner affirmatively concealed the exportation of cash as part of the scheme in which they were both involved. To advance the scheme the two men committed numerous "affirmative acts," including lying to customs officers, using an alias, and purchasing tickets in cash only minutes before departure. Also, following petitioner's arrest, officers found unfiled CMIR forms filled out in the name "Hector Gomez" and falsely stating that the cash belonged to a Mexican business. Accordingly, neither Guzman nor petitioner passively acquiesced in the failure to disclose the exportation of currency. The evidence therefore satisfied the requirements of *London* and *Shannon*, and clearly distinguished this case from the hypothetical case posited in *Woodward*.

2. Petitioner contends (Pet. 20-25) that the court of appeals erred in holding that Fed. R. Evid. 703 authorized the government's witness, Agent Marcello, to base his export opinion on information that he learned from interviews with Zawadzki. In fact, the court of appeals did not so hold; the court instead simply held that the alleged er-

ror, if any, was harmless in light of the overwhelming evidence of petitioner's guilt. Pet. App. A25. Petitioner does not refute this assessment. Accordingly, he has not shown that a favorable resolution on the merits of this issue would affect the judgment against him.[2]

3. Petitioner contends (Pet. 26-30) that the district court erred in excluding the testimony of Gerald Nickelsburg, whom he called as an expert on South American currency controls. The admissibility of expert testimony is a matter committed to the sound discretion of the district court. *United States* v. *Esch*, 832 F.2d 531, 535 (10th Cir. 1987), cert. denied, No. 87-6280 (Feb. 2, 1988); *United States* v. *Felak*, 831 F.2d 794, 797 (8th Cir. 1987). In this case, there was no abuse of discretion because the proffered testimony was not relevant to the issues at trial. The evidence at trial showed that petitioner orchestrated

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[2] In any event, Fed. R. Evid. 703 specifically permits an expert to base his opinion on evidence that is not introduced at trial. The Rule provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The Advisory Committee Notes confirm that the Rule permits the expert to base his opinions on the statements of individuals who do not testify at trial. In this case, Agent Marcello formed his opinion from a number of sources: his training in the techniques used by those engaged in money laundering, his debriefing of suspects in other cases, his years of experience in the DEA and the Customs Service, the evidence adduced at trial, and his debriefing of Zawadzki. Gov't C.A. Br. 39. Agent Marcello's testimony thus conformed to the Rule, and there was no error. *United States* v. *Affleck*, 776 F.2d 1451, 1458 (10th Cir. 1985) (testimony of government's expert accountant, which was based in part on his interviews with defendant's employees, was admissible).

the flow of drug money from the United States to Europe, through European banks, and back into United States banks. Transfer of currency in and out of South America was not at issue. At voir dire, Nickelsburg admitted that he knew nothing about money laundering and he had no knowledge of petitioner or his business dealings. Gov't C.A. Br. 14. Nickelsburg therefore lacked expertise in the areas relevant to the jury's deliberations.

4. Petitioner alleges (Pet. 31-34) that the court of appeals made three factual errors in its opinion, and that this Court should grant review to correct those errors. It is well settled, however, that this Court does not sit to correct such errors. *United States* v. *Johnston,* 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."); *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U.S. 508 (1924) (dismissing the writ upon discovering that the dispute involved a question of fact rather than law); *Houston Oil Co.* v. *Goodrich,* 245 U.S. 440 (1918) (same). Cf. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967).

In any event, petitioner's allegation of factual errors is meritless. Petitioner first contends that the court of appeals erred in finding that a search was conducted for currency reports filed under Guzman's name. In fact, the evidence at trial showed that such a search was conducted and that Guzman's name was included in the search. Although the witness who conducted the search initially forgot to list Guzman, later in her testimony she acknowledged that she had conducted such a search and that the search had uncovered only one filing mailed by Guzman. Gov't C.A. Br. 26, n. 25, citing Tr. 1040.

Petitioner next complains (Pet. 32) that the court of appeals stated, in its lengthy list of evidence supporting the narcotics conspiracy charge, that petitioner had learned of

"Zawadzki's narcotics arrest"; he contends that the court of appeals had to step outside the record to conclude that petitioner knew Zawadzki's arrest was for narcotics offenses. Pet. App. A16. But this fact may be inferred from evidence showing that immediately after Zawadzki's arrest, petitioner rushed to Los Angeles to retrieve the drug money concealed in Zawadzki's apartment. Knowledge that Zawadzki was charged with narcotics offenses may also be inferred from petitioner's close relationship with Zawadski and from the fact that petitioner's own phone book contained the beeper numbers used by the narcotics traffickers. Gov't C.A. Br. 13.

Finally, although petitioner no longer contests his extradition from Switzerland, he nevertheless complains (Pet. 33-34) that the court of appeals failed to give proper effect to the extradition decree's provision that he was not to be tried for the "fiscal aspects" of his charged activities. In fact, the court carefully analyzed the issue, and found that the Swiss extradition order is best interpreted to permit the prosecution of petitioner "to the full extent of the indictment" (Pet. App. A22, A23), and that the currency transaction charges should be subject to prosecution (Pet. App. A23). Petitioner would read the Swiss order more narrowly, but as the opinion of the court of appeals shows, the broader reading is the more natural one.

5. Petitioner contends (Pet. 35-37) that there is no reporting requirement for a transfer of more than $10,000 within a financial institution and, therefore, his convictions on Counts 3 and 4 cannot stand. Those counts charged that petitioner was in the business of "transmitting funds abroad for others" and that on two specific occasions, his financial institution failed to report the receipt of more than $400,000, in violation of 31 U.S.C. 5322(b). The evidence at trial showed that in these two instances,

Zawadzki collected money from narcotics traffickers and recorded the receipt of the cash in his ledger. He then gave the money to Spiteri in Los Angeles. Spiteri, in turn, transported the cash to petitioner in London. Petitioner then deposited the cash in Republic National Bank. Gov't C.A. Br. 25. Accordingly, these transactions did not take place entirely "within" petitioner's financial institution, as he claims. Rather, the trafficker's deposits passed *through* the institution and were ultimately deposited in a foreign bank. Under the plain terms of the regulations, petitioner was required to report these transactions by filing CTRs. See 31 C.F.R. 103.22(a)(1) ("each financial institution * * * shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000").[3]

6. Finally, petitioner argues (Pet. 38-39) that the Double Jeopardy Clause bars the imposition of cumulative punishment on the counts charging conspiracy to aid and abet the possession and distribution of cocaine and conspiracy to fail to report currency transactions. Under the *Blockburger* test (284 U.S. at 304), however, these offenses are not the same. Although there is an overlap in the evidence, the two counts charge violations of different conspiracy statutes, and the object of each conspiracy is different. See *Albernaz* v. *United States*, 450 U.S. 333 (1981) (multiple punishment may be imposed for con-

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[3] Contrary to petitioner's claim (Pet. 36), *United States* v. *Mouzin*, 785 F.2d 682, 690-691 (9th Cir. 1986), cert. denied, 479 U.S. 985 (1986), is entirely consistent with the decision below. The court in *Mouzin* concluded that there was insufficient evidence that the defendant there had "received" the currency because the authorship of the ledger and computer printout submitted to prove receipt was not established, so those documents were inadmissible. There was no basis for any similar finding of inadmissibility here.

spiracy to import and conspiracy to distribute marijuana, even where both conspiracies arose from a single agreement). The object of the narcotics conspiracy is to aid and abet the possession and distribution of cocaine, while the object of the currency conspiracy is circumvention of the reporting requirements for transactions over $10,000. Petitioner points to no legislative history indicating that Congress did not intend to authorize cumulative penalties for these offenses. See *id.* at 340-343. Accordingly, he has not rebutted the presumption in favor of cumulative punishment that arises when each offense requires proof of a fact that the other does not. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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